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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

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LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; ROBERT L. LEDERER, M.D.; JACK KLAPPER, M.D.; RAY PIPER, D.O.; FRED PACQUETTE, M.D.; CHRISTINE PETERSON, M.D.; JOHN CARROLL; STEPHEN KOZLOFF, M.D.; BRUCE WILSON; and MICHAEL VITEK, M.D.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether or not the Tenth Circuit Court of Appeals erred in affirming the granting of summary judgment by the District Court on the ground that members of a State Regulatory Board, such as the Colorado State Board of Medical Examiners, enjoy an absolute immunity from liability under 42 U.S.C. Section 1983.

2. Whether or not the Tenth Circuit Court of Appeals erred in affirming the granting of summary judgment by the District Court on the ground that if the members of the Colorado State Board of Medical Examiners do not enjoy absolute immunity, they are nonetheless entitled to qualified immunity since the members of the board summarily suspended Petitioner's license to practice podiatry without affording Petitioner any prior notice, hearing or opportunity to be heard, and then kept Petitioner under suspension after the hearing was terminated in Petitioner's favor, contrary to long-standing precedent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

—o—

Petitioner, Lenord S. Horwitz, D.P.M. respectfully prays that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered July 7, 1987, which affirmed the Order of the United States District Court for the District of Colorado of September 3, 1985, granting Summary Judgment in favor of Respondents and against Petitioner.

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OPINIONS BELOW

On September 3, 1985, the United States District Court for the District of Colorado entered a Memorandum Opinion and Order granting summary judgment in favor of the Respondents and against the Petitioner thereby dismissing Petitioner's complaint under 42 U.S.C. Section 1983. A copy of said Memorandum Opinion and Order is reproduced as Appendix A.

On July 7, 1987, the Tenth Circuit Court of Appeals entered its Judgment affirming the Trial Court's decision. A copy of said Judgment is reproduced as Appendix B.

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JURISDICTION

This Court has exclusive jurisdiction to review the Judgment of the Tenth Circuit Court of Appeals by virtue of 28 U.S.C. Section 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution is reproduced as Appendix C. The provisions of 42 U.S.C. Section 1983 are reproduced as Appendix D. Certain provisions of the Colorado Administrative Procedures Act, C.R.S. 24-4-104(3), 104(4) and 104(6) are reproduced as Appendix E. Certain provisions of the Colorado Medi-

cal Practices Act, C.R.S. 12-36-103 and 118 are reproduced as Appendix F.

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STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of Colorado, on April 16, 1984, as a civil rights action pursuant to 42 U.S.C. Sections 1983 and 1988 [Civil Action No. 84-M-817]. The Defendants were the Colorado State Board of Medical Examiners and its then-current members. On September 3, 1985, District Judge Matsch granted a Motion for Summary Judgment in favor of all defendants, dismissing with prejudice the Plaintiff's Complaint. [Memorandum Opinion and Order, Appendix A]

On September 30, 1985, Plaintiff filed his Notice of Appeal in the Tenth Circuit Court of Appeals.

As used in this Petition, the Petitioner will be referred to as "Dr. Horwitz" or "Petitioner"; the Respondent Colorado State Board of Medical Examiners shall be referred to as "The Board"; Respondents Klapper, Mohler, Piper, Wilson, Vitek and Lederer shall be referred to as "Members of the Inquiry Panel"; and Respondents Pacquette, Peterson, Fieger, Kozloff and Carroll shall be referred to as "Members of the Hearing Panel". The Individual Respondents may also collectively be referred to as "Members of the Board". It should be noted that Dr. Horwitz stipulated to the dismissal of Drs. Fieger and Mohler from the within action.

STATEMENT OF FACTS

Since this matter is before this Court to review the granting of a summary judgment by the trial court, and the affirmance thereof by the Tenth Circuit Court of Appeals, the facts set forth in the Complaint are to be taken as substantially true and therefore, the following statement of facts is taken primarily from the Amended Complaint filed in the District Court reproduced as Appendix G. See, e.g. *Owens v. Rush*, 654 F.2d 1370 (10 Cir. 1981).

Between the years 1979 and 1983, inclusive, approximately sixteen charges of unprofessional conduct were filed against Dr. Horwitz with The Board, the body with jurisdiction at that time to take disciplinary action against podiatrists in Colorado. Fifteen of the sixteen charges were initiated by The Board on its own motion. Prior to July 15, 1983, after two evidentiary hearings on fourteen of the charges, Dr. Horwitz had been found by the Hearing Panel of The Board to have committed no acts of unprofessional conduct as such term was defined in the then version of the Colorado Podiatry Act, C.R.S. 12-32-107.

On or about July 15, 1983, Dr. Horwitz entered into a Stipulation with The Board whereby the Board agreed to dismiss with prejudice the two remaining charges and Dr. Horwitz agreed to allow his surgical practice to be supervised by an ambulatory foot surgeon and his record-keeping practices to be supervised by a podiatrist. [Appendix G, Exhibit A]. Dr. Stephen Albert, who is not an ambulatory foot surgeon, was appointed by The Board to act as the supervisor for both record keeping and surgery.

Prior to December 1, 1983, Dr. Albert submitted reports to The Board wherein he indicated certain record keeping deficiencies that he claimed to have observed, together with the corrective measures that were undertaken by Dr. Horwitz. Dr. Albert, however, had submitted no negative reports concerning the surgical practices of Dr. Horwitz prior to December 1, 1983, and in fact, the only report submitted by Dr. Albert concerning Dr. Horwitz' surgical practice was that such surgical practice and technique were within the standards of the community.

On or about December 1, 1983, The Inquiry Panel of the Board met separately with Dr. Albert and Dr. Horwitz for the expressed purpose of determining why Dr. Albert had only supervised a limited number of surgical procedures. During the Inquiry Panel meeting with Dr. Albert, he expressed some concern about the level of quality of Dr. Horwitz' surgical practice, and expressed that he believed Dr. Horwitz to be a danger to the public. Thereafter, the Inquiry Panel met with Dr. Horwitz and his counsel to discuss why the number of surgical supervisions set forth in the written stipulation had not occurred. At no time during the meeting with Dr. Horwitz did The Board advise Dr. Horwitz that it had received any complaint concerning his surgical practice, give Dr. Horwitz any opportunity to make any response to Dr. Albert's unsubstantiated accusations, or advise Dr. Horwitz that discipline against him was being contemplated. Upon Dr. Horwitz' departure from the meeting, the Inquiry Panel voted to summarily suspend Dr. Horwitz' license to practice podiatry, instructed the office of the Attorney General to prepare a Formal Complaint, and instructed Dr. Albert to submit a written report. At no time after

December 1, 1983 or prior to the filing of a formal complaint on December 21, 1983, did the Board or the Attorney General make any effort to notify Dr. Horwitz that charges had been leveled against him or give him an opportunity to give his side of the story. It should be noted that Dr. Albert had a duty under the Stipulation to give a copy of any report that he submitted to the Board simultaneously to Dr. Horwitz, which he failed to do with the December 12, 1983 report. Dr. Albert failed to disclose to the Board that there were other independent witnesses present during the procedures which formed the basis of the complaint against Dr. Horwitz.

On or about December 21, 1983, the Board filed a new Formal Complaint against Dr. Horwitz, alleging grossly negligent conduct on the part of Dr. Horwitz. At no time prior to December 21, 1983, did any member of the Board read Dr. Albert's written report. The December 21, 1983 Formal Complaint was initiated without any informal proceedings being afforded to Dr. Horwitz, without any prior notice to Dr. Horwitz and without any investigation having been undertaken by The Inquiry Panel as is required by both the Colorado Administrative Procedures Act, Appendix E, and the Colorado Medical Practices Act, Appendix F. At the time time, The Board also entered an Order of Summary Suspension, whereby the license of Dr. Horwitz to practice podiatry was summarily suspended pending the determination of the allegations contained in the Formal Complaint, which Order of Summary Suspension is reproduced as Appendix H.

A hearing on the merits commenced on January 19, 1984. On February 6, 1984, the Hearing Officer appointed

by the Inquiry Panel to hear the charges found in Dr. Horwitz' favor on 42 of the 44 allegations contained in the Formal Complaint and Order of Summary Suspension; found that the two proven charges were relatively minor, and recommended Dr. Horwitz' immediate reinstatement to his license to practice podiatry, subject to his completion of the July 15, 1983 stipulated supervision, which supervision was to expire on March 1, 1984. The Hearing Officer's Initial Decision is reproduced as Appendix I.

Thereafter, both the Hearing Panel and Inquiry Panel refused to reinstate Dr. Horwitz to his license, and as a result, Dr. Horwitz remained under suspension for three additional months. The Hearing Panel ultimately entered Orders, Supplemental Orders, and Amended Supplemental Orders, reproduced as Appendix J, the net effects of which were as follows:

a. The Hearing Officer found no deficiencies in Dr. Horwitz' surgical, aseptic or anaesthetic techniques. [See Initial Decision, Appendix I] However, the Hearing Panel ordered that Dr. Horwitz be under one-year supervision, at his own expense, so that podiatrists appointed by the Board could observe these aspects of Dr. Horwitz' practice which were not found to be deficient.

b. Dr. Horwitz was suspended from his practice for a period of four months despite an express finding by the Hearing Officer that Dr. Horwitz engaged in only two relatively minor acts of substandard conduct, to wit: (i) Dr. Horwitz failed to see to the incubation of a bacterial culture for over one hour, although the culture was incubated in sufficient time to insure accurate test results; and (ii) Dr. Horwitz failed to take a presurgical X-ray

until immediately prior to performing the surgery, although the X-ray was taken and reviewed prior to the surgery and the condition being treated could be treated without X-rays. [Appendix I].

c. The Hearing Panel found an additional violation concerning the sterility of the swabs used by Dr. Horwitz to take bacterial cultures. However, Dr. Horwitz was neither charged with such violation nor was such finding supported by evidence in the record and the Colorado Court of Appeals subsequently struck and disallowed such finding.

All of the actions taken by the Inquiry Panel and the Hearing Panel were taken despite the fact that only one member of the Board had properly taken and filed an Oath of Office as required by Colorado law. Therefore, there was not a quorum of duly constituted members of either the Inquiry Panel or the Hearing Panel to lawfully act against Dr. Horwitz.

The District Court granted Summary Judgment in favor of the Board, the Inquiry Panel members and the Hearing Panel members on the ground that they were absolutely immune from 42 U.S.C. Section 1983 liability, or at least qualifiedly immune under the facts and circumstances of this case. The Court declined to award attorney fees to the Board members under 42 U.S.C. Section 1988.

The Tenth Circuit Court of Appeals agreed that the Members of the Board are absolutely immune from liability under *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), and that even under a qualified immunity standard, the Board did not violate any clearly

established constitutional standard in summarily suspending Dr. Horwitz' license without prior notice or opportunity to be heard, and therefore, Dr. Horwitz' 1983 action could not be sustained.

This Petition for Writ of Certiorari presents Dr. Horwitz' last resort to obtain relief from profound, severe and significant deprivations of his constitutional and statutory rights.

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REASONS FOR GRANTING THE WRIT OF CERTIORARI

There are compelling reasons for this Court to grant the requested Writ of Certiorari in this case. The Tenth Circuit Court of Appeals held that the members of a state regulatory board, the Colorado State Board of Medical Examiners, were absolutely immune from suit, merely because the enabling act for the Medical Board authorized the members of the Board to take discretionary action concerning the licensees under its jurisdiction, while at the same time, ignoring the remainder of the statute which not only limits the Board Members' immunity from suit but also specifies the procedures the Board must follow in taking such discretionary action. In holding that the members of the board were absolutely immune from suit, the Tenth Circuit ignored the holdings and rulings of this Court, deviated from stare decisis, sanctioned numerous statutory violations by the Board under Colorado law and utterly deprived the Petitioner of any judicial remedy for grievous deprivations of his long-standing Constitutional rights.

A. BY IGNORING A STATE ENABLING STATUTE AND APPLYING COMMON LAW THE TENTH CIRCUIT HAS GRANTED THE RESPONDENTS ABSOLUTE IMMUNITY AND HAS DEFEATED THE BOARD, REMEDIAL PURPOSE OF SECTION 1983.

In the present case, the State of Colorado enacted enabling legislation which granted the Respondents immunity from liability under Section 1983 but such immunity was a qualified good faith immunity, only. (C.R.S. 12-36-103, Appendix F)

The Tenth Circuit, in applying a common law immunity ignored totally the above enabling Statute and afforded the Respondent absolute immunity from suit.

Such a ruling is in contravention of this Court's precedent which has held that states, by adopting legislation, cannot immunize their officials from liability under Section 1983. *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980).

In this case an anamolous situation was created in that the State of Colorado did not immunize its officials, the Respondents herein, from liability, but rather the Tenth Circuit Court of Appeals did so.

Members of the Board can enjoy no immunity greater than that which the statute which defines their position confers upon them.

If officials take their office knowing that they are *not* shielded from liability in certain cases, as where the statute defines the limits of their liability, the Courts cannot grant the public officials common law immunity which exceeds their statutory immunity. In the case of the mem-

bers of the Board of Medical Examiners, the enabling statute shields them from liability *only* for acts they perform in good faith. This [qualified] immunity extends to ANY ACTION, CIVIL OR CRIMINAL, based upon disciplinary proceedings or other official acts, including, ostensibly, a civil rights suit under 42 U.S.C. Section 1983. C.R.S. 12-36-103, Appendix F. The members of the Board have demonstrated by their actions that they believe themselves to be above the law. The Tenth Circuit Court of Appeals has held that the Board Members are even above the very law that sets forth their official duties and immunities.

The Tenth Circuit illogically and clearly erroneously held, on the one hand, that the Respondents *have absolute immunity* because of their statutorily-defined powers and duties, but, on the other hand, that the very same statute *does not limit or define the Board members' immunity.* The statute, C.R.S. 12-36-103, grants immunity only when the members of the Board act in good faith, no matter in what capacity the Board Members act. Appendix F.

B. THE BOARD MEMBERS UNDER A COMMON LAW THEORY ENJOY ONLY A QUALIFIED IMMUNITY FROM SUIT.

Obviously, were the members of the Board judges or prosecutors, Petitioner would, in all likelihood, not be arguing the question of official immunity before this Court. However, what the Tenth Circuit ruled is that, based on *Butz v. Economou, supra,* the Board Members are immune as if they were judges and prosecutors. This holding overlooks this Court's express language in *Butz, supra* as well as this Court's holdings in cases subsequent to *Butz.*

This Court in *Butz* did not extend immunity to the Secretary of Agriculture, who was the functional analog to the individual Board members in this case. The immunity was extended only to the Administrative Law Judge who actually heard the case and who made findings and recommendations which were reviewed by Butz; the attorney who prosecuted the case, and the persons who filed the Complaint. As applicable to this case, then, absolute immunity would extend only to Marshal Snider, the Hearing Officer; Thomas J. Lyon, Esq., the prosecutor for his in hearing prosecutorial actions; and Stephen Albert, the person who filed the Complaint.

In *Cleavinger v. Saxner*, 474 U.S. —, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985), this Court made its most recent pronouncement concerning the immunity of state board members. This Court there held that a prison disciplinary board which has authority to take discretionary disciplinary action against prisoners who are charged with violating rules and regulations, akin to the members of the Board of Medical Examiners who have authority to take such discretionary disciplinary action against a licensee charged with unprofessional conduct, enjoy only a *qualified immunity* from suit.

The language of *Cleavinger, supra,* is instructive. The Court recognized the adjudicatory nature of the board's duties in that the prison board determines guilt or innocence; it hears testimony and receives documentary evidence; it evaluates credibility and weighs evidence; and it renders a decision. Yet, because the prison officials (like members of the Board of Medical Examiners) are not professional hearing officers and are mere-

ly officials temporarily diverted from their usual duties, the Court found that the need for absolute immunity is outweighed by the harm of constitutional deprivation.

If one were to catalogue the officials who have only qualified immunity, it becomes immediately apparent that if this Court affords absolute immunity to members of the Medical Board, such members will be afforded greater protection than the vast majority of public officials without any strong rationale for such protection. All of the following have been afforded only qualified immunity from Section 1983 damage suits: The Secretary of Agriculture (*Butz*, supra) the Attorney General of the United States, while performing functions in the interest of national security [*Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)]; State governors [*Scheuer v. Rhoades*, 416 U.S. 232 (1974)]; prison disciplinary board members (*Cleavinger*, supra); school board members [*Wood v. Strickland*, 420 U.S. 308 (1975)]; Presidential aides (*Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)]; Senators performing nonlegislative duties [*Hutchinson v. Proxmire*, 443 U.S. 111 (1979)]; prosecutors performing investigation [*Rex v. Teeples*, 753 F.2d 840 (10th Cir. 1985)]. Only actual judges, actual prosecutors, administrative law judges, grand jurors and legislators have been afforded absolute immunity.

Accordingly, the precedent established by this Court would clearly indicate that the Members of the Board in this case should be afforded only qualified immunity from liability, yet the Tenth Circuit ignored such precedent and allowed the Board Members absolute immunity. Such holding should be reversed.

C. FOR REASONS OF COMPELLING PUBLIC POLICY, THE MEMBERS OF THE BOARD ENJOY ONLY A QUALIFIED IMMUNITY.

If this Court approves of the finding of absolute immunity decided by the Tenth Circuit, this Court will sanction all manner of constitutional deprivations by the Board because those affected by such unconstitutional action will be deprived of any effective remedy. The Board [as in this case], based upon an *ex parte,* unsworn, unverified and undocumented report, could make a "finding" that it has reasonable grounds to believe that there is an emergency and summarily suspend a license to practice, giving the licensee *no* prior notice or opportunity to be heard; have a hearing within a short period of time after the licensee has already been suspended; require the licensee to remain under suspension for an additional period of time to allow either side to file exceptions; and require the licensee to still remain under suspension for an unspecified longer period of time for the Board to consider those exceptions even if the *licensee files NONE.* Therefore, literally, a licensee can be deprived of his right to earn a livelihood for a substantial period of time (three or four months) even if he did nothing wrong, as in this case. If this Court allows the Board members absolute immunity, it sanctions such an outrage. The extreme nature of the deprivations, coupled with the possibility for abuse by the Board, cry out for this Court to afford a licensee a remedy. Qualified immunity is more than sufficient protection for the Board members, and absolute immunity should not be allowed.

Even if, as a matter of general policy, the members of a state regulatory board should enjoy some immunity

from suit, the totality of the circumstances of this case militate against affording such protection to the members of this Board. In this case, not only did the members of the Board violate all of the procedural provisions of both the Medical Practices Act and the Administrative Procedures Act, they also violated the very statutory provisions which enable them to act in any capacity. By virtue of the Medical Practices Act and Article XII of the Colorado Constitution, (Appendices F and K) the members of the board are required to take proper oaths of office prior to assuming their statutory duties. Less than a quorum of either panel of the Board that acted against the Petitioner complied with this requirement. This problem is also shrugged off by the Respondents and was discarded by the Tenth Circuit. However, it is submitted that this problem should be considered *in the totality of the circumstances* when this Court makes its determination of whether or not to deny certiorari and thereby protect these Board Members from liability for their wrongful acts.

Again, a cataloging of deprivations helps put this matter into perspective.

1. There are three statutes that require notice and opportunity to be heard prior to institution of Medical Board complaints: C.R.S. 12-36-118(4), 24 4-104 (3) and 24-4 104(6). Neither notice nor opportunity were given.

2. C.R.S. 12-36-118(4) requires an investigation. No investigation was had.

3. C.R.S. 24-4-104(3) requires the Board to give the licensee opportunity to comply with lawful requirements. No such opportunity was given.

4. C.R.S. 24-4-104(4) requires prompt determination of agency proceedings. The proceedings were commenced December 21, 1983 and were not determined until May 10, 1984, despite having a hearing in January, 1984, from which a decision was rendered in February, 1984.

5. C.R.S. 12-36-103 and Article XII of the Colorado Constitution require oaths of office. Oaths taken before those not authorized by law to administer them are a nullity.

6. C.R.S. 24-4-104(4) requires reasonable grounds to believe that an emergency exists before issuing a summary suspension order. The *ex parte*, unsworn, unverified and uncorroborated statement of one witness cannot constitute reasonable grounds on which to base a finding, and the Board did not believe there was an emergency since it waited twenty-one days after receiving Dr. Albert's verbal report before it took action.

It is submitted that in the totality of circumstances, these final factors should be considered by the Court as an added reason to deny the Board members absolute immunity.

D. THE BOARD MEMBERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE OF THEIR DISREGARD OF KNOWN PRECEDENT.

The District Court and the Tenth Circuit apparently did not believe that the Petitioner's right to receive notice and opportunity to be heard prior to his being suspended was a clearly established constitutional right in December, 1983, the time of his summary suspension.

Petitioner has continually cited *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) for the propo-

sition that he was entitled to due process safeguards prior to being suspended. The District Court and the Tenth Circuit held that Petitioner can constitutionally be suspended without any notice or opportunity to be heard so long as a prompt hearing is given. What is particularly galling about the Tenth Circuit opinion is that the Tenth Circuit acknowledged that Mr. Barchi received substantially more process than the Petitioner received, yet did not believe this to be a controlling fact. Barchi received notice and opportunity to be heard (although not a full-blown evidentiary hearing) prior to being suspended. Dr. Horwitz did *NOT* receive *either* notice or opportunity to be heard prior to his suspension and in fact, the order of the Board suspending Dr. Horwitz' license to practice was concealed from him for twenty-one days. Furthermore, the Court in *Barchi* found constitutionally defective the fact that Barchi had to serve out his entire term of suspension before his case was determined. Dr. Horwitz served out a term of suspension of almost five months for conduct that was only serious enough, in the judgment of the Members of the Board, to warrant probation. In short, the very problem this Court sought to avoid in *Barchi* occurred in this case.

In *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 84 L.Ed.2d 494 (1985) *Barchi* was upheld and cited with approval *for the very reason that* Barchi was given presuspension notice and opportunity to present his side of the story. 84 L.Ed.2d at P. 504. Likewise, in the *Dr. Good* case, *Colorado State Board of Medical Examiners v. District Court,* 191 Colo. 158, 551 P.2d 194 (1976), relied upon by the Tenth Circuit to establish that the Board

had no reason to believe it was violating Dr. Horwitz' rights, Dr. Good also received notice and several opportunities to be heard on the merits prior to being suspended.

It is further submitted that if C.R.S. 24-4-104(4) allows for summary suspension without complying with the requirements of C.R.S. 24-4-104(3), then 24-4-104(6) has no meaning. The latter section provides that no license may be suspended or revoked without a prior hearing. Furthermore, if 24-4-104(4) allows for unfettered exercise of the right of summary suspension without any prior notice or opportunity of the licensee to be heard, then 24-4-104(4) must be unconstitutional.

CONCLUSION

This country was founded upon principles of liberty and justice, with the concept that an individual had the right to be free from unfettered and arbitrary governmental action. If an agency is allowed to capriciously and whimsically suspend a person's license to practice his chosen livelihood and not be held accountable for its actions, the concepts of life, liberty and the pursuit of happiness are empty promises.

The members of the Colorado State Board of Medical Examiners have heaped indignities upon the Petitioner. They have violated his constitutional and statutory rights. It is prayed that this Court reverse the judgment of the United States Tenth Circuit Court of Appeals and remand this cause to the United States District Court for the Dis-

trict of Colorado so that the members of the Board may be held to answer for the damages they caused.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-817

LENORD S. HORWITZ, D.P.M.,

Plaintiff,

v.

BOARD OF MEDICAL EXAMINERS OF
THE STATE OF COLORADO, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed September 3, 1985)

This is an action for damages brought by Lenord S. Horwitz, a licensed podiatrist, against the Colorado State Board of Medical Examiners ("the Board") and its individual members. The amended complaint alleges that by subjecting the plaintiff to unfounded complaints, summarily suspending and refusing to reinstate his license to practice podiatry the defendants violated his Fourteenth Amendment due process rights, defamed him and subjected him to outrageous conduct. Horwitz seeks compensatory and punitive damages plus attorney's fees. The due process claims are asserted pursuant to 42 U.S.C. § 1983 with jurisdiction under 28 U.S.C. § 1331, and the state law claims are asserted under the doctrine of pendent jurisdiction.

Summary judgment is a drastic remedy available only in the clearest circumstances where there are no material

facts in dispute. The facts in this case are set forth in the defendants' motion for summary judgment filed April 15, 1985. While the defendants' version tracks the allegations in the plaintiff's amended complaint, plaintiff's response to the motion filed May 6, 1985, disputes or enlarges upon certain parts of the defendants' version. For the purposes of this motion the plaintiff's version will be accepted as true. Nevertheless, none of the disputed facts is relevant to the legal issues raised by the defendants, and plaintiff concedes as much by asserting that he is entitled to summary judgment as a matter of law on the immunity issue. (Plaintiff's response at 3).

I

The individual defendants contend that they have official immunity and cannot be held personally liable for decisions made pursuant to their duties on the Board. The individual defendants are correct, and summary judgment will be entered in their favor.

State and Federal officials exercising adjudicative functions are entitled to absolute immunity. *Butz v. Economou,* 438 U.S. 478, 512-517 (1978). "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages." *Id.* at 512-513. A participant in a state administrative agency exercising adjudicative authority who is sued under § 1983 for violating the federal Constitution is entitled to the same immunity. *Id.* at 504.

The Board was created by statute passed by the General Assembly, and its members are appointed by the Gov-

ernor of Colorado. The Board may make investigations, hold hearings, take evidence, subpoena witnesses, administer oaths, compel testimony and the production of books, papers and records. § 12-36-104 C.R.S. It serves in part to resolve disputes between the state and licensed professionals, and its decisions are subject to review by the state courts of Colorado. § 24-4-106 C.R.S. The defendant is given notice of the charges and an opportunity to respond. If the charges are proven, the hearing panel may determine what discipline should be imposed, ranging from a letter of admonition to a revocation of license to practice. § 12-36-118(g) C.R.S. The Colorado Administrative Procedures Act, § 24-4-104(4) C.R.S. also empowers the Board to "summarily suspend the license pending proceedings for suspension or revocation" without giving the practitioner notice of the complaints against him or an opportunity to respond, when there are grounds to believe that the public welfare requires such emergency action. *See, Colorado State Board of Medical Examiners v. District Court,* 191 Colo. 158, 551 P.2d 194 (1976). The Board and its members were plainly acting within the scope of their authority when they ordered the plaintiff's suspension.

The Board's powers are "functionally comparable" to those of a court of law. The risk of an unconstitutional act by individuals on the Board is clearly outweighed by the importance of attracting qualified individuals to serve with such agencies and of preserving their independent judgment. "Those who complain of error in such proceeding must seek agency or judicial review." *Butz v. Economou,* 438 U.S. at 509, 514.

Horwitz argues that the individual Board members have no immunity because they have not taken, or there

is no record of them taking, an oath of office. This contention is meritless. The reasons described in *Butz* for affording immunity apply with equal force whether or not these defendants, who were duly appointed by the Governor, have taken an oath of office. Even assuming the plaintiff's interpretation of the requirements of the Colorado Constitution is correct, there is no doubt that the individual defendants were at least *de facto* public officials. *See, Butler v. Phillips,* 38 Colo. 378, 381, 88 P. 480 (1906).

Horwitz contends that the defendants are being sued "for the way in which the proceedings were handled after the decision was made to prosecute." (Memorandum Brief at 6). The plaintiff contends that a proper reading of *Butz* is that only the person presiding at a hearing is absolutely immune from liability. This argument is also without merit. The reasons for absolute immunity apply equally to the hearing officer and to the Board members. The ultimate responsibility for making findings of fact and conclusions of law is placed by statute upon the Board. In its final order issued May 1, 1984 the Board adopted many findings of the hearing officer but made certain other findings and conclusions directly contrary to the position of the hearing officer. (Defendants' exhibit 1). Reviewing the decision of the hearing officer, the function the plaintiff himself claims the Board engaged in, is itself an adjudicatory function entitling the individual defendants to absolute immunity.

Even accepting the plaintiff's contention that the individual defendants have only qualified immunity, they cannot be liable under these circumstances because their

actions in summarily suspending the plaintiff's license on December 21, 1983 and refusing to reinstate it until May 1, 1984 did not violate a clearly established constitutional right of which a reasonable person would have known. *See, Davis v. Scherer,* 52 U.S.L.W. 4956 (June 28, 1984). The only court decision directly addressing the constitutionality of § 24-4-104(4) C.R.S. expressly holds that summary suspensions of licenses does not violate constitutional guarantees of due process. *Colorado State Board, supra,* 551 P.2d at 196. The authority relied on by the plaintiff, *Cleveland Board of Education v. Loudermill,* 53 U.S.L.W. 4306 (March 19, 1985) was decided after the Board's decision to suspend Horwitz and thus any constitutional right to present his side of the story before his license suspension could not have been "clearly established" at the time the Board members acted.

II

The claim against the Board itself seeking $1,000,000 is barred by the Eleventh Amendment to the United States Constitution. In the absence of consent or federal congressional abrogation of the right, Colorado or its agencies or departments cannot be liable for money damages in an action in federal court. *See, Pennhurst State School & Hospital v. Halderman,* 52 U.S.L.W. 4155, 4158 (January 23, 1984). Any consent must "be unequivocally expressed." *Id.* at 4157. *See also, Quern v. Jordan,* 440 U.S. 332 (1979). The immunity is not, as Horwitz suggests, an affirmative defense that is waived if not pleaded. It is a constitutional limitation the waiver of which must be affirmatively manifested. The State Board of Medical

Examiners is an agency of Colorado and has not unequivocally expressed its consent to be sued in this court.

Since the defendants are immune from any action for damages brought against them under § 1983 and based on the federal Constitution, the remaining pendent state claims must be dismissed. "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

Accordingly, it is

ORDERED, that the defendants' motion for summary judgment is granted as to all claims under 42 U.S.C. § 1983, and it is

FURTHER ORDERED, that the state law claims are dismissed without prejudice and it is

FURTHER ORDERED, that this civil action is dismissed. Defendants shall recover their costs of action.

Dated: September 3rd, 1985

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

APPENDIX B

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LENORD S. HORWITZ, D.P.M.,

Plaintiff-Appellant,

v.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; ROBERT L. LEDERER, M.D.; JACK KLAPPER, M.D.; RAY PIPER, D.O.; HENRY FEIGER, M.D.; FRED PACQUETTE, M.D.; CHRISTINE PETERSON, M.D.; JOHN CARROLL; NELSON MOHLER, D.O.; STEPHEN KOZLOFF, M.D.; BRUCE WILSON; MICHAEL VITEK, M.D.,

Defendants-Appellees.

No. 85-2448

(Filed July 7, 1987)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. No. 84-M-817)

Richard S. Strauss (Jordan Hochstadt with him on the briefs) of Hochstadt, Straw & Strauss, P.C., Denver, Colorado, attorneys for Plaintiff-Appellant.

F. Michael Ludwig (David B. Perry with him on the brief) of Wood, Ris & Hames, P.C., Denver, Colorado, attorney for Defendants-Appellees.

Before LOGAN, BARRETT and ANDERSON, Circuit Judges.

BARRETT, Circuit Judge.

The issue presented on this appeal is whether members of the Colorado State Board of Medical Examiners, sued individually for damages for alleged deprivation of plaintiff-appellant's civil rights, are entitled to absolute immunity or qualified immunity. The district court, in granting defendants-appellees' motion for summary judgment, ruled that because the defendants performed functions comparable to those of a court of law when they ordered the suspension of plaintiff's license to practice medicine in Colorado, they were entitled to absolute immunity. We agree.

Background

Plaintiff-appellant, Lenord D. Horwitz, D.P.M., hereinafter referred to either as plaintiff or Dr. Horwitz, was licensed to practice podiatry in Colorado in 1964.

During the period 1970-1983, some sixteen charges of unprofessional conduct were filed against Dr. Horwitz with the State Board of Medical Examiners of the State of Colorado (the Board), which is the state body empowered to license physicians and to take disciplinary action against them. Fifteen of the sixteen charges had been initiated by the Board. Prior to July 15, 1983, after

two evidentiary hearings involving fourteen of the charges, the hearing panel of the Board found that Dr. Horwitz had not violated any provision of the Podiatry Act, C.R.S. 12-32-107, as amended. On July 15, 1983, Dr. Horwitz and the Board entered into a Stipulation whereby the Board agreed to dismiss with prejudice the two remaining charges of unprofessional conduct lodged against Dr. Horwitz in consideration of Dr. Horwitz's agreement to allow his surgical practice to be supervised by an ambulatory foot surgeon and his record keeping practice to be supervised by a podiatrist. One Dr. Stephen Albert was appointed by the Board to serve as supervisor for both record keeping and surgery.

Dr. Albert submitted reports to the Board prior to December 1, 1983, indicating that certain records kept by Dr. Horwitz had been deficient, but that Dr. Horwitz had undertaken corrective measures. Dr. Albert did not submit any negative reports relative to Dr. Horwitz's surgical practice. Also, on the same day, Dr. Albert and Dr. Horwitz met with the hearing panel of the Board relative to why Dr. Albert had supervised only a limited number of Dr. Horwitz's surgical practices. During the course of this meeting, out of the presence of Dr. Horwitz, Dr. Albert expressed concern about the quality of Dr. Horwitz's surgical practice, and stated his belief that Dr. Horwitz was a danger to the public. The inquiry panel thereafter met with Dr. Horwitz and his attorney relative to reasons why the number of surgical supervisions set forth in the Stipulation had not occurred. No reference was made to Dr. Albert's complaints about Dr. Horwitz's surgical practice. Following Dr. Horwitz's departure from the meeting, the hearing panel voted to summarily suspend

Dr. Horwitz's license to practice podiatry in Colorado and instructed the office of the Attorney General to prepare a formal complaint.

The Board's order of December 21, 1983, was based both on oral and written reports submitted by Dr. Albert to the Board and it contained a finding required under C.R.S. § 24-4-104(4) that the Board had reasonable grounds to believe that Dr. Horwitz's practice of podiatry constituted a threat to his present and future patients, and therefore to the public health, safety and welfare such as to imperatively require emergency action. On that same day, the Board filed its formal complaint and on January 4, 1984, Dr. Horwitz was served with the Order of Summary Suspension and Formal Complaint. Dr. Horwitz submitted his written response on January 5, 1984, but continued to practice podiatry until restrained from doing so by order of the District Court for the City and County of Denver on January 9, 1984. Within fifteen days of Dr. Horwitz's response and within ten days of the issuance of the temporary restraining order, a full evidentiary hearing before a qualified hearing officer was held. Dr. Horwitz was represented by counsel and was afforded full opportunity to present evidence, express his positions and to fully cross-examine all witnesses.

On February 6, 1984, the hearing officer rendered his decision. He found in Dr. Horwitz's favor on forty-two (42) of the forty-four (44) allegations and also found against him on two charges, which he identified as relatively minor. The hearing officer recommended that Dr. Horwitz's license to practice podiatry be immediately reinstated, subject to his completion of the supervision previously agreed upon. Thereafter, the hearing panel

and the inquiry panel of the Board denied Dr. Horwitz's application for reinstatement, and on May 1, 1984, the hearing panel, following review of the hearing transcript, entered its Final Order which in part affirmed the hearing officer's decision, in part modified the decision and in part included independent findings. The Order placed Dr. Horwitz on a one-year probation, subject to supervision. It also imposed certain requirements.

Litigation

Dr. Horwitz filed this action pursuant to 42 U.S.C. §§ 1983 and 1988 against the State Board of Medical Examiners and its then current members. He sought compensatory and punitive damages, together with attorney's fees, alleging that he had been subjected to unfounded complaints, summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights, and defamed and subjected to outrageous conduct. The Board was dismissed from the suit by virtue of the State's claim of sovereign immunity invoked pursuant to the Eleventh Amendment. That ruling is not challenged on appeal.

Prior to filing the instant action, Dr. Horwitz appealed the Board's Final Order to the Colorado Court of Appeals, seeking review of the action summarily suspending his license. The due process contentions advanced here were presented there. The court rejected the due process contentions and bad faith allegations. The court affirmed the Board's order except for the probationary requirement that Dr. Horwitz complete courses in anesthetics and aseptics. Dr. Horwitz filed a petition for rehearing and after its denial he filed a petition for writ

of certiorari with the Colorado Supreme Court. This, too, was denied.

Functions of the Board

The Board is a statutory body whose eleven members are appointed by the governor. C.R.S. § 12-36-103(1). Its powers, duties and functions are set forth in the Colorado Medical Practices Act, C.R.S. § 12-36-101, *et seq* (1973 as amended) and the Colorado Administrative Procedure Act, C.R.S. § 24-4-101, *et seq.* (1973 as amended).

Broad judicial and prosecutorial powers of the Board are set forth in C.R.S. § 12-36-104, while Board procedures required for disciplinary proceedings are set forth in C.R.S. § 12-36-118. The Board consists of a president and ten members, two of whom are from the public at large, nine of whom are licensed physicians. The president divides the members into two panels for disciplinary action, each panel consisting of at least four physician members. Each panel serves as both an inquiry panel and a hearing panel. When a written complaint is received, the inquiry panel undertakes an investigation into the charges in order to determine whether there are sufficient grounds for a hearing. The Board is empowered to investigate all complaints and to initiate them. If further proceedings are warranted, the matter is referred to the hearing panel which may conduct an evidentiary hearing or refer the matter to an appointed hearing officer for an evidentiary hearing, subject to the hearing panel's review. The individual against whom a complaint is filed must be informed of the charges and provided an opportunity to respond and appear in his own defense with counsel. When the hearing panel submits its report or order with

findings and conclusions, it becomes the order of the Board.

C.R.S. § 24-4-104(4) empowers the Board to summarily suspend a license to practice medicine when the Board has reasonable grounds to believe that the public health, safety, or welfare is endangered and the board finds that emergency action is required. In *Colorado State Board of Medical Examiners v. District Court*, 191 Colo. 158, 551 P.2d 194 (1976), the Colorado Supreme Court upheld this statute against due process contentions similar to those advanced here. The Colorado Court of Appeals, on review of the Order of the Board entered in the instant case, specifically upheld the Board's action summarily suspending Dr. Horwitz's license to practice medicine under *Colorado State Board, supra.* Further, the court found that the record supported the Board's determination that there were reasonable grounds to believe that emergency action was required.

District Court Order

In granting the defendants' motion for summary judgment, the federal district court found that none of the disputed facts were relevant to the legal issues raised by defendants on the immunity issue and ruled that:

> The Board's powers are "functionally comparable" to that of a court of law. The risk of an unconstitutional act by individuals on the Board is clearly outweighed by the importance of attracting qualified individuals to serve with such agencies and of preserving their independent judgment. "Those who complain of error in such proceeding must seek agency or judicial review." *Butz v. Economou*, 438 U.S. at 509, 514.

R., Vol. II, Exh. 7.

The district court also found that the Board and its members were "plainly acting within the scope of their authority when they ordered the plaintiff's suspension." *Id.*

Contentions on Appeal

On appeal, Dr. Horwitz argues that the district court erred in granting summary judgment in favor of the defendant Board members because: (1) as a matter of law, the Board members have not established that they are entitled to an absolute or qualified immunity, (2) whatever immunity may attach to the Board members does not apply in this case inasmuch as they did not (except for one Dr. Fieger) subscribe an oath of office as required by law, (3) there is no absolute immunity for members of the Inquiry Panel inasmuch as C.R.S. § 12 36-103(5) grants only a good faith immunity involving disciplinary proceedings or other official acts, and (4) the law was well established at all times pertinent to this case that Dr. Horwitz had a valuable property interest in his license to practice and that it could not be taken from him without due process of law which was not provided in this case.

Before addressing the above contentions, we observe that on appeal the defendants-appellees argue, for the first time, that Dr. Horwitz's claims are barred on appeal by the full faith and credit clause of the Constitution, 28 U.S.C. § 1738. This argument is based on the contention that Dr. Horwitz is precluded from raising claims before this court that were or could have been raised in the action before the Colorado Court of Appeals.

As a general rule, we will not review matters raised for the first time on appeal. *K-B Trucking Co. v. Riss*

Intern. Corp., 763 F.2d 1148 (10th Cir. 1985). This rule does not apply to defenses going to our jurisdiction, however. They may be raised for the first time on appeal. *Garc'a v. Bd. of Ed. of Socorro Consolo. School Dist.*, 777 F.2d 1403 (10th Cir. 1985), *cert. denied*, — U.S. — (1986). Res judicata rules and principles must be raised as affirmative defenses. They are waived if not raised as affirmative defenses in the trial court and cannot be raised for the first time on appeal, *Nevada Power Co. v. Watt*, 711 F.2d 913, 932-933 (10th Cir. 1983), unless peculiar facts and the interests of judicial economy dictate otherwise. *Lujan v. United States Dept. of the Interior*, 673 F.2d 1165, 1168 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982).

Here, the opinion of the Colorado Court of Appeals was rendered on June 27, 1985, more than two months before the federal district court granted the summary judgment in the case at bar. Even so, there is nothing in the record before us indicating that the defendants-appellees brought the matter to the attention of the federal district court. In addition, we have reviewed the record on appeal and do not find therein an authenticated copy of the judgment of the Colorado Court of Appeals required under 28 U.S.C. § 1738 in order to have full faith and credit effect. Thus, under the circumstances, we do not believe that the defendants-appellees have presented peculiar facts or demonstrated reasons why the interests of judicial economy dictate that this court consider their res judicata issue for the first time.

I.

Dr. Horwitz contends that the district court committed clear error in finding and ruling that the defend-

ants enjoy absolute immunity from suit for the official activities they exercised in his case. Instead, he contends that if the Board members are entitled to any immunity, it can be no greater than the "good faith" immunity defined in the statute limiting their liability. C.R.S. § 12-36-103. He further argues that the district court erred in finding and ruling that the defendants were entitled to summary judgment, even accepting the proposition that defendants have only a qualified immunity.

The district court reasoned that when the defendants summarily suspended Dr. Horwitz's license and refused to reinstate it until May 1, 1984, they did not violate a clearly established constitutional right of due process. Dr. Horwitz contends that the law was well established, and that the defendants must have known or be charged with knowledge of the due process requirements of notice and hearing to which he was constitutionally entitled.

Absolute immunity, which affords complete protection from liability for damages, defeats suit at the outset. On the other hand, "qualified immunity" is an affirmative defense to be asserted by a government official performing discretionary functions. It is premised on the contention that the challenged conduct was undertaken in good faith or did not violate clearly established law or constitutional rights that a reasonable person would have known. *Harlow v. Fitzgerald;* 457 U.S. 800 (1982).

The parties agree that *Butz v. Economou,* 438 U.S. 478 (1978) is a seminal case on the issue of immunity. As may be expected, the parties disagree on its import to the case at bar. Dr. Horwitz contends that when the *Butz* court denied Butz absolute imunity because he was

not acting the equivalent of a judge or prosecutor, the same reasoning applies to the Board members. The significant holding in *Butz*, argues Dr. Horwitz, was the denial of absolute immunity to Secretary Butz while acting in his official capacity of reviewing the decision of an administrative law judge. Dr. Horwitz likens the Board members' review of the hearing officer's decision in the instant case to Butz's review. The Board members, on the other hand, point out that all of the steps from the summary suspension through the final decision of the hearing panel constituted the adjudicative scheme found in *Butz* to confer absolute immunity on executive-agency officials. We agree. The *Butz* decision granted absolute immunity to administrative officials performing functions analogous to those of judges and prosecutors if the following formula is satisfied: (a) the officials' functions must be similar to those involved in the judicial process, (b) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct. That formula is satisfied in the case at bar.

In *Pierson v. Ray*, 386 U.S. 547, 553 (1967), the Supreme Court recognized that judges, performing acts within their judicial jurisdiction, are absolutely immune from damages in civil actions. In *Imbler v. Pachtmann*, 424 U.S. 409 (1976), the Court held that prosecutors are quasi-judicial officers when their official duties involve them in the judicial phase of initiating and prosecuting a criminal proceeding. Absolute immunity from liability for damages has also been held to apply to legislators while acting in their legislative capacities, *Eastland v.*

United States Servicemen's Fund, 421 U.S. 491 (1975), to the President, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), to parole officers while making parole decisions, *Martinez v. California,* 444 U.S. 277 (1980), and to legislative aides acting in their legislative capacities. *Gravel v. United States,* 408 U.S. 606 (1972). Judicial immunity from damages is not a bar to injunctive relief against a judge for actions taken in his or her official judicial capacity. *Pulliam v. Allen,* 466 U.S. 522 (1984).

Butz v. Economou did extend the doctrine of absolute immunity to executive officials, such as the Board members here, while engaging in judicial acts. Later, in *Cleavinger v. Saxner,* 106 S. Ct. 496 (1985), the Court held that absolute immunity from damages applies to federal hearing examiners and administrative law judges. Dr. Horwitz would confine the absolute immunity doctrine, per his interpretation of *Butz,* to the hearing officer only. We disagree.

Butz v. Economou involved an action for damages against the Secretary and other executive officials of the Department of Agriculture following the Department's unsuccessful attempt to revoke the registration of a commodity futures commission company. Various constitutional rights violations were charged. The federal district court held that the Secretary, the assistant Secretary, the Judicial officer, the Chief Hearing Examiner and counsel for the Department who prosecuted during the proceeding were absolutely immune. The Court of Appeals reversed, holding that the defendant officials were entitled only to a qualified or "good faith" immunity. The Supreme Court majority reversed, holding that while qualified immunity from liability for damages is the gen-

eral rule applicable to executive department officials, there are certain functions performed by such officials that require complete, absolute immunity.

The Court held that such officials who perform adjudicatory functions within the federal agency, who must decide to initiate or pursue a proceeding subject to agency adjudication, and agency personnel who present evidence in such proceedings, are entitled to absolute immunity. Thus, the Court looked to the officials' duties and functions. It likened adjudicatory functions within agencies to judicial functions, prosecutorial functions such as initiating, arranging and presenting evidence to prosecutorial functions and presenting evidence as witness functions. The Court held that these functions were clearly within the limits of statutory duties which the Department officials were charged to perform, thus affording them absolute immunity from damages. The Court recognized that "the extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guaranties," *Id.* at 505, and that "[a]ll individuals, whatever their position in government, are subject to federal law." *Id.* at 506. Nevertheless, the Court held that "[i]n a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to . . . qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." (Footnote omitted). *Id.* at 507.

The "exceptional situations" identified in *Butz* were situations arising when executive department officials, such as the Board members in the case at bar, functional-

ly serve in capacities comparable to judges, prosecutors and jurors. As such, they serve as "quasi-judicial" officers and are absolutely immune from private suits for damages. The Court explained:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seeks to resolve are every bit as fractious as those which come to court. . . . Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. . . . They are conducted by a trier of fact insulated from political influence. . . . A party is entitled to present his case by oral or documentary evidence, . . . and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. . . . The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

Id. at 513.

The *Butz* court then likened the tasks of the federal hearing examiner or administrative law judge as "functionally comparable" to that of a judge, and observed:

> In light of these safeguards, we think that the risks of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for

> their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

Id. at 514.

The Court also held that agency officials performing certain functions analogous to those of a prosecutor, including decisions to initiate administrative proceedings against an individual or corporation and to seek certain sanctions, are entitled to absolute immunity. *Id.* at 515. The *Butz* court further held that an agency attorney who presents evidence and conducts the administrative trial serves the same function as a prosecutor and is therefore entitled to absolute immunity. In conclusion, the Court stated:

> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceedings provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

Id. at 516.

This court has recognized and applied the *Butz* rationale in cases involving state administrative/executive officials serving in adjudicative, judicial, or prosecutorial capacities. *Lentsch v. Marshall,* 741 F.2d 301 (10th Cir. 1984); *Wilhelm v. Continental Title Co.,* 720 F.2d 1173 (10th Cir. 1983), *cert. denied* 465 U.S. 1105 (1984); and *Johnston v. Herschler,* 669 F.2d 617 (10th Cir. 1982). The *Butz* court deemed "[i]t untenable to draw a dis-

tinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the constitution against federal officials." 438 U.S. at 504.

We conclude that under the *Butz* court rationale, the defendant Board members, who performed statutory functions both adjudicatory and prosecutorial in nature, are entitled to absolute immunity from damages liability under 42 U.S.C. § 1983. There exists a strong need to insure that individual Board members perform their functions for the public good without harassment or intimidation. There exist adequate due process safeguards under Colorado law to protect against unconstitutional conduct without reliance upon private damages lawsuits. It is important to insulate Board members from political influences in meeting their adjudicatory responsibilities in the adversial setting involving licensure to practice medicine. Public policy requires that officials serving in such capacities be exempt from personal liability.

In the evaluation of the Board members' functions, we observe that they serve in the prosecutorial role in that they, among other things, initiate complaints, start hearings, make investigations, take evidence, and issue subpoenas. They also serve in the adjudicative role, as judges. Thus, the Board duties are "functionally comparable" to a court of law. And we are reminded that, with respect to immunity, we must include all acts of the official performing statutory duties as having "[m]ore or less connection with the general matters committed by law" to his station. *Spalding v. Vilas*, 161 U.S. 483 (1896). *See Simons v. Bellinger*, 643 F.2d 774 (D.C. Cir. 1980) (holding

that members of the D.C. Committee on Unauthorized Practice of Law perform duties functionally comparable to duties performed by judges and prosecutors, thus entitling them to absolute immunity from damages liability); *Mayes v. Horn,* 542 F.2d 822, 824 (10th Cir. 1976) (recognizing the quasi-judicial immunity enjoyed by a state Board of Law Examiners); *Ginger v. Circuit Court for County of Wayne,* 372 F.2d 621 (6th Cir.), *cert. denied,* 387 U.S. 935 (1967) (holding that state judges and members of the grievance committee of State Bar of Michigan while acting in their statutory powers in a disbarment proceeding were absolutely immune from a damages liability in a 42 U.S.C. § 1983 action); *Verner v. State of Colorado,* 533 F. Supp. 1109 (D. Colo. 1982), *affirmed,* 716 F.2d 1352 (10th Cir. 1983), *cert. denied,* 466 U.S. 960 (1981) (holding a 42 U.S.C. § 1983 damage claim against members of two state boards dealing with practice of law barred by doctrine of quasi-judicial immunity).

The district court, for purposes of its order granting the defendants' motion for summary judgment, accepted the allegations of Dr. Horwitz's complaint as true and found, as a matter of law, that the Board members were entitled to summary judgment on the immunity issue. We agree. The district court properly relied on *Butz v. Economou,* in concluding, as a matter of law, that the Board members exercised adjudicative functions comparable to those exercised by a court of law. The district court gave careful consideration to the delicate balancing problems involved in this case. In *Barr v. Matteo,* 360 U.S. 564 (1959) the Supreme Court recognized that the doctrine of immunity, absolute or qualified, to be extended to public officials,

is one of judicial making, involving the delicate balancing of the rights of citizens to obtain damages relief for wrongs committed by public officials and the need to assure that public officials will perform their duties unfettered by the concern that their actions may subject them to costs of defense and the possibility of a damage award against them. The nature of the particular duty performed by a public official determines the reach and appicability of the immunity doctrine. *Doe v. McMillan*, 412 U.S. 306 (1973); *Clulow v. State of Oklahoma*, 700 F.2d 1291 (10th Cir. 1983) (holding that Oklahoma Bar Association officials charged with statutory duties involving attorney disciplinary cases enjoy absolute immunity); *G.M. Leasing Corp. v. United States*, 560 F.2d 1011 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

II.

Dr. Horwitz argues that whatever immunity may otherwise attach in this case does not apply because the Board members (except for Dr. Fieger) did not subscribe an oath of office as required by law. The district court ruled that, even assuming the truth of this contention, still the individual defendants were at least *de facto* public officials. The court relied on *Butler v. Phillips*, 38 Colo. 378, 381, 88 P. 480 (1906). We agree.

Butler v. Phillips involved a challenge to the jurisdiction of a county court and the right of the county court judge to act. The Supreme Court rejected the challenge, holding that although the statute creating the judgeship was unconstitutional, still the county judge elected thereunder was an officer de facto whose judgeship acts were therefore valid. The Court quoted from *State v. Carroll*,

38 Conn. 449, 9 Am. Rep. 409, in defining the *de facto* officer doctrine:

> An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: . . . under the color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath . . . .

88 P. at 481.

The challenge must also fail under the "*de facto* officer doctrine." That doctrine distinguishes between collateral attacks wherein a plaintiff challenges government action on the ground that the official who took the action was improperly in office, such as here, and direct attacks wherein the plaintiff challenges the qualifications of the officer, rather than the actions taken. The doctrine holds that collateral attacks pose too great a threat that past actions of the challenged official would be subjected to wholesale invalidation and thus interfere with orderly government. *Andrade v. Lauer,* 729 F.2d 1475 (D.C. Cir. 1984).

III.

Dr. Horwitz contends that there can be no absolute immunity for the Board members inasmuch as the enabling statute creating the Board provides under C.R.S. § 12-36-103(5) that Board members:

> "[s]hall be immune from suit in any action, civil or criminal, based upon any disciplinary proceedings

or other official acts *performed in good faith* as members of such board." (emphasis supplied)

Dr. Horwitz's challenge ignores the fact that the immunity claimed by the Board members here is based on common law immunity, *supra*, rather than on any statutory grant. Throughout this action, the defendant Board members have argued that they are entitled to the common law absolute immunity historically afforded judges, prosecutors and other officials involved in the judicial process because as they function in adjudicatory and prosecutorial capacities during disciplinary proceedings.

The district court did not err in applying the traditional common law immunity doctrine.

IV.

Finally, Dr. Horwitz argues that summary judgment was not appropriate because there is no question that his due process rights were violated. He states that in December, 1983, and thereafter, the law was well established that his property interest in his license was important enough that it could not be taken from him without providing him due process of law. Dr. Horwitz relies on cases such as *Berry v. Barchi,* 443 U.S. 55 (1979), *Gerstein v. Pugh,* 420 U.S. 103 (1975). *Bell v. Burson,* 402 U.S. 535 (1971), and *Keney v. Derbyshire,* 718 F.2d 352 (10th Cir. 1983). He contends that his due process rights were violated here because he was not provided with any notice or pre-suspension procedures prior to the summary supension of his license on December 21, 1983, nor was the matter promptly determined and acted upon thereafter.

The district court found that when Dr. Horwitz's license was summarily suspended on December 21, 1983, and not reinstated until May 1, 1984, no clearly established constitutional rights of which a reasonable person would have known were violated. The court pointed to *Colorado State Board of Medical Examiners v. District Court, supra,* as the only court decision addressing the constitutionality of C.R.S. § 24-4-104(4), and found that that decision expressly holds that summary suspensions of licenses do not offend constitutional guarantees of due process. Furthermore, the district court observed that the case of *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), relied on by Dr. Horwitz, was decided after the Board suspended his license and thus could not have been the basis for any clearly established constitutional rights of Dr. Horwitz which were offended by the Board's suspension. We agree.

Dr. Horwitz relies strongly on *Barry v. Barchi* for the proposition that he was entitled to due process safeguards prior to the summary suspension of his license. The *Barry* court, while recognizing that the horse trainer's license issued by the New York Racing Board was such a property interest as to invoke due process protections, nevertheless held that the state's interest in assuring the integrity of racing entitled the state to impose an interim suspension without a presuspension hearing:

> Unquestionably, the magnitude of a trainer's interest in avoiding suspension is substantial; but the state also has an important interest in assuring the integrity of the racing carried on under its auspices. In these circumstances, it seems to us that the state is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would

> definitely determine the issues, whenever, it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging.

443 U.S. at 64.

It is true that the *Barry* decision does note, in passing, that:

> Furthermore, although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging; 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the state's investigators.

443 U.S. at 65.

The *Barry v. Barchi* Court, in our view, placed far more emphasis on the state's interest in preserving the integrity of the sport of racing and in protecting the public interest, than it did upon Barchi's presuspension due process rights:

> Even if the state's pre-suspension procedures, then, were not adequate finally to resolve the issues fairly and accurately, they sufficed for the purposes of probable cause and interim suspension.

443 U.S. at 66.

We recognize that a close reading of *Barry v. Barchi* does disclose that the licensee was given some opportunity to respond prior to the summary suspension order. That aspect of the case does not shine through as a clear due process requirement, however. It was cited in *Loudermill* as follows:

See also Barry v. Barchi, 443 U.S. 55, 65 (1979) (no due process violation where horse trainer whose license was susepnded "was given more than one opportunity to present his side of the story").

470 U.S. at 542.

The Colorado Supreme Court heard *Colorado State Board of Med. Examiners, etc. v. D.C. of 7th J. Dist.* en banc. It was a unanimous opinion. The court fully considered various United State Supreme Court decisions relied on by Dr. Horwitz here dealing with due process requirements in relation to his contention that he was entitled to some form of hearing prior to suspension of his license. The court held that no presuspension notice of hearing is required when the Medical Board finds that an emergency exists and "[t]here is adequate support for the Board's conclusion that an emergency exists." 551 P.2d at 196.

None of the cases cited by Dr. Horwitz deal with suspensions of licenses of medical practitioners under "emergency" determinations of the governing board. Thus, we agree with the district court's conclusion that at the date of Dr. Horwitz's license suspension, there was no clearly established constitutional law requiring that Dr. Horwitz be accorded some "opportunity to present his side of the story." What is clear from this record is that under the command of *Barry v. Barchi, supra*, and like decisions, Dr. Horwitz was accorded prompt and full post-suspension due process. Following the summary suspension of his license on December 21, 1983, a formal complaint was filed on January 4, 1984, and following a response, etc., a formal

hearing was commenced on January 19, 1984. The matter was expeditiously handled through to the hearing panel's final order of May 1, 1984.

WE AFFIRM.

APPENDIX C

AMENDMENT 14

Section 1. *Citizens of the United States.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; nor shall any State deprive any person of life, liebrty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. *Representatives—Power to reduce apportionment.*

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. *Disqualification to hold office.*

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. *Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.*

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. *Power to enforce amendment.*

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX E

24-4-104. *Licenses - issuance, suspension or revocation, renewal.* (1) In any case in which application is made for a license required by law, the agency, with due regards for the rights and privileges of all interested persons, shall set and conduct the proceedings in accordance with this article unless otherwise required by law.

(2) Every agency decision respecting the grant, renewal, denial, revocation, suspension, annulment, limitation, or modification of a license shall be based solely upon the stated criteria, terms, and purposes of the statute, or regulations promulgated thereunder, and case law interpreting such statutes and regulations pursuant to which the license is issued or required. Terms, conditions, or requirements limiting any license shall be valid only if reasonably necessary to effectuate the purposes, scope, or stated terms of the statute pursuant to which the license is issued or required.

(3) No revocation, suspension, annulment, limitation, or modification of a license by any agency shall be lawful unless, before institution of agency proceedings therefor, the agency has given the licensee notice in writing of facts or conduct that may warrant such action, afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and, except in cases of deliberate and willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements.

(4) Where the agency has reasonable grounds to believe and finds that the licensee has been guilty of de-

liberate and willful violation or that the public health, safety, or welfare imperatively requires emergency action and incorporates such findings in its order, it may summarily suspend the license pending proceedings for suspension or revocation which shall be promptly instituted and determined.

24-4-104. *Licenses-issuance, suspension or revocation, renewal.* (6) No previously issued license shall be revoked, suspended, annulled, limited, or modified, except as provided in subsection (3) of this section, until after hearing as provided in section 24-4-105.

APPENDIX F

12-36-103. *State board of medical examiners - immunity - subject to termination.* (1) There is hereby created the Colorado state board of medical examiners, referred to in this article as the "board", which shall consist of nine physician members and two members from the public at large to be appointed by the governor and to have the qualifications provided in this article. On or after July 1, 1951, the state board of medical examiners as constituted under the law of this state immediately prior thereto is hereby abolished, but the members thereof shall constitute the initial board under this article, and the respective terms of such members shall extend through and expire on the third day of May of the year in which their respective terms, as determined by their appointments under such prior law, would have expired. In 1953 and in each second year thereafter, the governor shall appoint three physician

members for terms beginning May 4 of said year and expiring May 3 of the sixth year thereafter. One member of the public at large shall be appointed for a term ending May 3, 1979, and the other for a term ending May 3, 1981; thereafter, public member appointments shall be for six-year terms.

(2) The board shall be comprised at all times of seven members having the degree of doctor of medicine, and two members having the degree of doctor of ostepathy, all of whom shall have been licensed and actively engaged in the practice of their professions in this state for at least three years next preceding their appointments and shall have been residents of this state for at least five years next preceding their appointments, and two members of the public at large. In making appointments to the board, the governor shall give due consideration to recommendations submitted by the Colorado state medical society with respect to appointments to each office, if any, to be filled by a physician holding the degree of doctor of medicine and to recommendations submitted by the Colorado osteopathic association with respect to appointments to each office, if any, to be filled by a physician holding the degree of doctor of osteopathy.

(3) In the event a vacancy in the membership of the board occurs for any cause other than expiration of a term, the governor shall appoint a successor to fill the unexpired portion of the term of such member whose office has been so vacated and shall appoint such new member in the same manner as members for a full term. Each member of the board, before he enters upon the duties of his office, shall take an oath or affirmation to support the constitution of

the United States and of the state of Colorado and to faithfully perform the duties of the office upon which he is about to enter. Members of the board shall remain in office until their successors have been appointed. A member of the board, upon notice and hearing, may be removed by the governor for continued neglect of duty, incompetence, or unprofessional or dishonorable conduct.

(4) The board shall elect biennially from its members a president, a vice-president, and a secretary. Regular meetings of the board or either panel, established pursuant to section 12-36-118, shall be held as scheduled by the board in the state of Colorado. Special meetings of the board may be called by the president or by three members of the board at any time on three days' prior notice by mail or, in case of emergency, on twenty-four hours' notice by telephone or telegraph, any such meetings to be held at the place designated in the call therefor. Except as provided in section 12-36-118 (6), a majority of the board shall constitute a quorum for the transaction of all business. All meetings of the board shall be deemed to have been duly called and regularly held, and all decisions, resolutions, and proceedings of the board shall be deemed to have been duly authorized, unless the contrary be proved.

(5) Members of the board shall be immune from suit in any action, civil or criminal, based upon any disciplinary proceedings or other official acts performed in good faith as members of such board.

(6) The provisions of section 24-34-104, C.R.S., concerning the termination schedule for regulatory bodies of the state unless extended as provided in that section, are

applicable to the Colorado state board of medical examiners created by this section.

* * *

12-36-118. *Disciplinary action by board.*

(4) (a) Complaints in writing relating to the conduct of any physician licensed or authorized to practice medicine in this state may be made by any person or may be initiated by the board on its own motion. The physician complained of shall be given notice by certified mail of the nature of all matters complained of and shall be given twenty days to make explanation or answer thereto. Upon receipt of the physician's answer or at the conclusion of twenty days if no answer has been received, the matter shall be referred to one panel acting as an inquiry panel for that particular case, referred to in this subsection (4) as the "inquiry panel", for investigation. The investigation may be made by one or more members of the inquiry panel, by one or more physicians who are not members of the board, by a member of the staff of the board, or by a professional investigator, as the inquiry panel directs, and it shall be entirely informal.

(b) The board shall cause an investigation to be made when the board is informed of:

(I) Disciplinary actions taken by hospitals to suspend or revoke the privileges of a physician and reported to the board pursuant to section 25-3-107, C.R.S.;

(II) Disciplinary actions taken by a professional review committee established pursuant to article 43.5 of this title against a physician;

(III) An instance of a medical malpractice settlement or judgment against a physician reported to the board pursuant to section 10-1-124, C.R.S.; or

(IV) Physicians who have been allowed to resign from hospitals for medical misconduct. Such hospitals shall report the same.

(c) On completion of an investigation, the inquiry panel shall make a finding that:

(I) The complaint is without merit and no further action need be taken with reference thereto;

(II) There is no reasonable cause to warrant further action with reference thereto;

(III) The investigation discloses an instance of unprofessional conduct which, in the opinion of the inquiry panel, does not warrant formal action by the board but which should not be dismissed as being without merit; in such case, a certified letter, return receipt requested, of admonition shall be sent to the physician against whom a complaint was made and a copy thereof to the person making the complaint, but, when a letter of admonition is sent by the inquiry panel to a physician complained against, such physician shall be advised that he has the right to request in writing, within twenty days after receipt of the letter, that formal disciplinary proceedings be initiated against him to adjudicate the propriety of the conduct upon which the letter of admonition is based. If such request is timely made, the letter of admonition shall be deemed vacated, and the matter shall be processed by means of formal disciplinary proceedings; or

(IV) The investigation discloses facts which warrant further proceedings by formal complaint, as provided in

subsection (5) of this section, in which event the complaint shall be referred to the attorney general for preparation and filing of a formal complaint.

(d) All proceedings pursuant to this subsection (4) shall be expeditiously and informally conducted so that no physician is subjected to unfair and unjust charges and that no complainant is deprived of his right to a timely, fair, and proper investigation of his complaint. A finding that no further action need be taken on the complaint shall not preclude the complainant from further pursuing the matter by filing a formal complaint as provided in subsection (5) of this section.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 84-M-817

LENORD S. HORWITZ, D.P.M.,

Plaintiff,

vs.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; ROBERT L. LEDERER, M.D.; JACK KLAPPER, M.D.; RAY PIPER, D.O.; HENRY FEIGER, M.D.; FRED PACQUETTE, M.D.; CHRISTINE PETERSON, M.D.; JOHN CARROLL; NELSON MOHLER, D.O.; STEPHEN KOZLOFF, M.D.; BRUCE WILSON; and MICHAEL VITEK, M.D.,

Defendants.

AMENDED COMPLAINT

COMES NOW the Plaintiff, by and through his attorneys, HOCHSTADT, STRAW & STRAUSS, P.C., and hereby states and alleges an Amended Complaint against the Defendants, and each of them, as follows:

I. JURISDICTION

1. Plaintiff is a podiatrist licensed to practice podiatry in the States of Ohio, Pennsylvania, New Jersey and Colorado, and is a resident and domiciliary of the State of Colorado.

2. Defendant State Board of Medical Examiners of the State of Colorado (hereinafter referred to as "Med Board") is, and at all times pertinent hereto, was, an agency of the State of Colorado with the statutory author-

ity to take disciplinary action against Podiatrists licensed in the State of Colorado.

3. Defendants Piper, Lederer, Peterson, Pacquette, Feiger, Klapper, et al. (hereinafter collectively referred to as "members of the Med Board") were, at all times pertinent hereto, members of the State Board of Medical Examiners. At all times pertinent hereto, said Defendants acted and have acted under color of the statutes of the State of Colorado as members of either the Inquiry Panel A or Hearing Panel B of Defendant Med Board.

4. This action is brought under the provisions of 42 U.S.C. § 1983, for violation by Defendants of the provisions of the Constitution of the United States of America and the State of Colorado. Jurisdiction of this Court is founded upon "federal question" jurisdiction under and pursuant to 28 U.S.C. § 1331 and under principles of pendent and ancillary jurisdiction.

II. NATURE OF THE COMPLAINT

5. Commencing in the year 1979 and continuing to the present, the Defendants, and each of them, with regard to the specific acts attributable to them respectively, have engaged in a campaign and pattern of practice to harrass, embarrass, annoy, defame, disparage and otherwise harm Plaintiff in his occupation and profession by subjecting Plaintiff to unfounded and groundless complaints, utterly and totally disregarding Plaintiff's statutory and constitutional rights, and ultimately, summarily suspending Plaintiff's license to practice Podiatry without cause or basis, and refusing to reinstate Plaintiff to his practice, all in violation of Plaintiff's rights to due process of law guaranteed to him under the Constitution of the United States

of America and of the State of Colorado, all as more fully set forth below. Said actions by the Defendants further constitute outrageous conduct and defamation as further set forth hereinbelow.

III. GENERAL ALLEGATIONS

6. During the year 1978, the Defendant Med Board notified Plaintiff that a complaint had been initiated by the Med Board charging Plaintiff with unprofessional conduct stemming from Plaintiff's conviction in the United States District Court for the District of Colorado for 22 misdemeanor criminal counts (hereinafter "the first Formal Complaint.")

7. In or about March, 1979, the Med Board, at a time when no complaint against Plaintiff was pending concerning Plaintiff's knowledge of podiatry or his podiatric skill and competence, caused two (2) subpoenas to be issued directed to Drs. Buchler and Benenati, two podiatrists who had recently purchased an office and podiatric practice maintained by Plaintiff on West Alameda Avenue, Denver, Colorado.

8. Said subpoenas were issued without notice to Plaintiff, and without giving Plaintiff any opportunity to informally respond to whatever charges, if any, on which said subpoenas were based, if at all, all in contravention of Plaintiff's rights to due process of law and C.R.S. 1973, 12-36-118(4).

9. Said subpoenas were issued to investigate unprofessional conduct on Plaintiff's part, it having been alleged that Plaintiff violated, in some unspecified manner, the provisions of C.R.S. 1973, 12-36-118, a statute which does not govern the conduct of podiatrists. Said subpoenas

therefore were issued in violation not only of procedural due process but substantive due process, as well.

10. Said subpoenas were further issued prior to any investigation having been performed by the Inquiry Panel A of the Med Board, again in contravention of Plaintiff's rights to due process of law and said C.R.S. 1973, 12-36-118, without obtaining the permission of and without the knowledge of the patients whose records were being examined. Some of the Defendants hereto were members of said Inquiry Panel during the year 1979. Plaintiff has made reasonable inquiry to discover the names of the persons who issued said subpoenas but has not been able to do so.

11. On or about March 29, 1979, three podiatrists, acting as agents for the Board of Medical Examiners, entered the offices of said Drs. Buchler and Benenati and unlawfully examined hundreds of files of patients for whom Plaintiff had performed podiatric services.

12. Without any factual, scientific, medical or podiatric basis, said podiatrists made a report to an investigator for the Office of the Attorney General alleging unprofessional conduct on Plaintiff's part concerning the care and treatment of six of the patients whose files were unlawfully examined by said three podiatrists. A written statement from said investigator subsequently was construed as a complaint by the Med Board.

13. Based upon said statement from the investigator, but without first notifying Plaintiff of the pendency of any complaint, and without first giving Plaintiff the opportunity to make informal response as required by the Medical Practices Act as set forth above and as required under principles of due process of law, Defendant members of the In-

quiry Panel caused a formal complaint to be filed against Plaintiff alleging unprofessional conduct by Plaintiff in the treatment of said six patients. Said complaint was raised by filing a Motion to Amend the previously-filed first Formal Complaint.

14. Said Motion to Amend the first Formal Complaint was dismissed by a Hearing Officer appointed to advise the Hearing Panel of the Board of Medical Examiners on the ground that the Med Board had failed to comply with the provisions of the Medical Practices Act.

15. Subsequent to said dismissal, notice was given to Plaintiff of the pendency of said complaint and Plaintiff was given the opportunity to informally respond thereto.

16. During the entire time in which Plaintiff was expected to file a response to said "complaint", Plaintiff's patient files were in the possession of Defendant Board as a result of their having been previously unlawfully seized as set forth above. Plaintiff was denied access to said files and did not have said files available for his review in the preparation of his informal response.

17. After said informal response was received, but without conducting any discovery or investigation as required by C.R.S. 1973, 12-36-118(4), a Third formal complaint was filed, alleging substantially the same facts as set forth in the previously-dismissed Motion to Amend the First Formal Complaint (a Second Formal Complaint having been filed based upon a complaint filed by a patient, which Second Formal Complaint was dismissed as more fully set forth below).

18. A hearing on the First Formal Complaint occurred on January 19, 1981. The First Formal Complaint

was dismissed at the conclusion of the Complainant's case on the ground that the Complainant had failed to prove any unprofessional conduct on Plaintiff's part arising out of said convictions in Federal Court.

19. At the time that the above-mentioned three podiatrists illegally examined and seized Plaintiff's patient files, said podiatrists also seized the file of Plaintiff's patient Judith Hibdon.

20. Subsequent to said seizure of Ms. Hibdon's records, Ms. Hibdon filed a complaint against Plaintiff alleging malpractice.

21. The files seized by said three podiatrists contained X-rays which were necessary for Plaintiff to prepare a defense to said malpractice action.

22. Upon information and belief, said three podiatrists gave possession of Ms. Hibdon's file to the Defendant Med Board.

23. During the pendency of said malpractice litigation, the Defendant Board relinquished possession of said file to Plaintiff and Ms. Hibdon, but kept the X-rays.

24. Defendant Board failed and refused to produce said X-rays despite receiving reasonable request therefor.

25. As a proximate result of Plaintiff's inability to gain possession of said X-rays, Plaintiff was forced to settle the malpractice litigation with Ms. Hibdon, inasmuch as he was unable to produce evidence tending to support his theory of the case.

26. As a proximate result of the complaint filed by Ms. Hibdon and the settlement of the malpractice litigation,

a Second Formal Complaint was filed by the Office of the Attorney General before the Med Board upon the express direction of the Defendant members of the Inquiry Panel of the Med Board.

27. That during the pendency of the Second Formal Complaint, but after the settlement of the malpractice litigation, the Defendant Board produced the subject X-rays.

28. That the Defendant Board and its individual members, the defendants herein, concealed evidence from Plaintiff, thereby forcing Plaintiff into an unjust settlement with Ms. Hibdon and subjecting Plaintiff to further charges before the Med Board.

29. Hearing upon four counts contained in the Third Formal Complaint occurred on August 1, 1982. At the conclusion of the case, the Hearing Panel of the Board of Medical Examiners dismissed the charges on the ground that the evidence failed to show any unprofessional conduct on Plaintiff's part concerning his care and treatment of said four patients.

30. Hearing on the remaining count contained in the Third Formal Complaint and upon the Second Formal Complaint was scheduled to occur on August 1, 1983. Prior thereto, on July 15, 1983, the said remaining two counts were dismissed with prejudice, and Plaintiff agreed to the terms and conditions contained in a written Stipulation.

31. During August, 1983, Dr. Stephen F. Albert, D.P.M. was appointed to act as Plaintiff's supervisor under the terms of said Stipulation.

32. On or about December 1, 1983, the Defendants Klapper, Lederer, Mohler, Piper, Wilson and Vitek, sitting

as members of the Inquiry Panel A of the Defendant Med Board, met and voted to summarily suspend Plaintiff's license to practice podiatry.

33. Prior to said vote being taken, said Defendants met with Plaintiff to discuss why the number of surgical supervisions set forth in the written stipulation had not occurred.

34. At no time during said meeting with Dr. Horwitz did said Defendants advise Plaintiff that they had received any complaint concerning Plaintiffs' practice, give Plaintiff any opportunity to make any response to any charges, or advise Plaintiff that any discipline against him was being contemplated.

35. Based upon the history of this case and upon the presence at said meeting of various members from the Office of the Attorney General, said Defendants knew, actually or constructively, that said summary suspension was unlawful, illegal, inviolation of Plaintiff's rights to due process of law, in violation of Plaintiff's rights under the Colorado Administrative Procedures Act and the Medical Practices Act. Said Defendants took said action despite having said knowledge.

36. On or about December 21, 1983, a Formal Complaint was filed against Plaintiff, and an Order summarily suspending Plaintiff's license to practice podiatry was issued by Inquiry Panel A.

37. Said Formal Complaint and Order of Summary Suspension were issued in violation of Plaintiff's constitutional rights to due process of law and in violation of Plaintiff's statutory rights in the following particuilars:

a. Plaintiff was given no advance notice of the pendency of any complaint against him by the Med Board;

b. Plaintiff was given no opportunity to respond informally to the charges contained in the Complaint;

c. The Board made no findings as mandated in C.R.S. 1973, 24-4-104(4);

d. Plaintiff was given no opportunity to comply with any lawful requirements as provided in C.R.S. 1973, 24-4-104(3);

e. Plaintiff's license to practice podiatry was taken away without a hearing in contravention of C.R.S. 1973, 24-4-104(3) and (6);

f. Plaintiff was not given an immediate determination as required by C.R.S. 1973, 24-4-104 and 24-4-105.

38. Hearing upon the Formal Complaint occurred on January 19 through 25, 1984, before a Hearing Officer.

39. On or about February 6, 1984, the Hearing Officer appointed to find the facts and to hear the charges issued his Initial Decision wherein he recommended that Plaintiff be immediately reinstated to his license to practice podiatry.

40. On or about February 7, 1984, after review of said Initial Decision, Plaintiff requested all Defendants to vacate the Order of Summary Suspension pending the final order of the Med Board.

41. On or about February 9, 1984, four of the five (or perhaps 6) members of Inquiry Panel A voted upon said request. One member voted to vacate the order of summary suspension and three members voted to deny

said request to vacate the order of summary suspension. Plaintiff has made due inquiry to determine the identity of said members of the Inquiry Panel who voted upon said request and how each voted, but has been expressly denied and refused said information.

42. Said Inquiry Panel member Defendants who voted upon Plaintiff's request to vacate the Order of Summary Suspension knew that the Hearing Officer had found that there were substantially no facts on which to base a continued suspension of Plaintiff's license to practice podiatry and knew that the Hearing Officer had recommended the immediate reinstatement of Plaintiff's license to practice.

43. Despite said knowledge, having no cause or justification, and contrary to the recommendation of the hearing officer, said Defendants, with the exception of the member of the Inquiry Panel who voted to grant Plaintiff's request to be restored to his license, failed and refused to so vacate the order of Summary Suspension and in fact, expressly denied Plaintiff's request.

44. On or about February 10, 1984, Plaintiff requested Defendants Feiger, Peterson and Pacquette, as members of the Hearing Panel, to vacate said Order of Summary Suspension.

45. Said Defendants knew on said date that the Hearing Officer had found that there were substantially no facts on which to base an order of summary suspension and that said Hearing Officer had recommended that Plaintiff be immediately reinstated to his license to practice.

46. Despite having said knowledge, and having no knowledge of any facts to the contrary, said Defendants voted to deny Plaintiff's request to be reinstated to his license to practice. Said denial was not based upon any facts, was without cause or justification and was contrary to the recommendation of the Hearing Officer.

47. Plaintiff has made due inquiry to determine if any member of the Hearing Panel voted to reinstate Plaintiff to his license to practice. Defendants have refused to provide said information to Plaintiff.

48. The denial by the members of Inquiry Panel A and of Hearing Panel B respectively named above of Plaintiff's request to be reinstated to his license to practice podiatry pending the outcome of the formal proceedings was made in bad faith, with actual or constructive malice, and with the knowledge by said individuals that there was no factual justification for the continued effectiveness of the Order of Summary Suspension and that the said denial constituted a manifest violation of Plaintiff's statutory and constitutional rights to due process of law.

49. As a proximate result of said Order of Summary Suspension, Plaintiff was precluded from practicing his chosen profession from January 9, 1984 to May 11, 1984.

50. As a proximate result of said Order of Summary Suspension, Plaintiff was deprived of his property without due process of law.

51. As a proximate result of said Order of Summary Suspension, Plaintiff was without means of earning an income or a living from January 9, 1984 to May 11, 1984.

Plaintiff has been and will continue in the future to be stigmatized by having had his license to practice suspended without hearing and without justification, and has suffered and will continue to suffer extreme and severe mental suffering, anguish and duress.

52. That on or about April 13, 1984, the Hearing Panel of the Board of Medical Examiners again met to discuss the Plaintiff's case. Sitting on the panel at said time were Drs. Pacquette, Peterson and Kozloff, as well as Mr. Carroll.

53. On said date, Plaintiff again requested that he be immediately reinstated to his license to practice podiatry.

54. Said request was again denied by said Defendant members of the Hearing Panel.

55. On or about May 1, 1984, the Hearing Panel of the Med Board, consisting of Defendants Carroll, Peterson, Pacquette and Kozloff, issued an Order concerning the Plaintiff's return to the practice of podiatry.

56. Said Order was issued by said Defendants in violation of Plaintiff's rights to due process of law in the following particulars:

a. Said Order contains punishment far in excess of the severity of the conduct of Plaintiff;

b. Said Order makes a finding that Plaintiff committed a violation of "the standard of care" with regard to an act with which Plaintiff was not charged, of which Plaintiff was given no notice or opportunity to respond, and which finding was based on facts not in the record;

c. Said Order imposes terms of probation which are unconstitutionally overbroad and vague.

57. Said members of the Hearing Panel knew, or should have known, that said Order was improper, illegal and unconstitutional, and issued said Order in bad faith, without regard to Plaintiff's rights.

58. That upon information and belief, each of the Defendants hereto, with regard to the conduct attributed to him or her as more fully set forth above, acted with knowledge of the impropriety of his or her act or acts, with reason to know of such impropriety, with callous and reckless disregard of Plaintiff's rights, without having any factual or legal justification for his or her actions, and with disregard for the propriety or legality of such acts, thereby constituting actual or constructive malice.

IV. FIRST CLAIM FOR RELIEF

59. Plaintiff hereby incorporates and realleges by reference each and every allegation contained in Paragraphs 1 through 58, above, inclusive, as though fully set forth herein.

60. That the Defendants, each with respect to the actions taken by them individually and collectively, have acted under color of the statutes of the State of Colorado with regard to Plaintiffs.

61. That said Defendants, each with respect to the actions taken by them individually and collectively, have deprived Plaintiff of his property without due process of law in violation of the 14th Amendment to the United States Constitution and 42 U.S.C. § 1983.

62. That the actions of the Defendants as set forth above were in excess of and contrary to the statutory authority granted to them and were therefore extrajudicial and ultravires.

63. That the actions of the Defendants as set forth above were taken by the Defendants with knowledge of their illegality or unconstitutionality, with knowledge that there was insufficient factual or legal basis for such actions, and were thus taken with malice, in bad faith or with reckless or wanton disregard for Plaintiff's rights.

64. As a proximate result of the Defendants' actions as set forth above, Plaintiff has incurred damages of a kind and nature as described hereinabove, in an amount as yet undetermined but reasonably believed and alleged to be in excess of $1,000,000.00.

V. SECOND CLAIM FOR RELIEF

65. Plaintiff hereby realleges and incorporates by reference each and every allegation contained and set forth in Paragraphs 1 through 64 above, inclusive, as though fully set forth herein.

66. Plaintiff is entitled to an award of exemplary damages as a proximate result of the respective actions of each of the Defendants herein, under the provisions of C.R.S. 1973, 13-21-102, and 42 U.S.C. § 1983.

67. That Plaintiff is entitled to an award of attorney fees from each Defendant under the provisions of 42 U.S.C. § 1988.

VI. THIRD CLAIM FOR RELIEF

68. Plaintiff hereby incorporates and realleges by reference each and every allegation contained and set forth in Paragraphs 1 through 67 above, inclusive, as though fully set forth herein.

69. That Defendants, and each of them, have published or caused to be published false statements of and concerning Plaintiff and his competence to practice his chosen profession, to wit: that Plaintiff has engaged in conduct of such a serious nature as to warrant the suspension of his license to practice podiatry and/or of such a serious nature that Plaintiff's license, having been suspended, should not be reinstated to him.

70. That Defendants, and each of them, in bad faith or with reckless disregard of the truth or falsity of said allegations, have caused said false statements to be placed as public record and have communicated the same to third parties.

71. That said statements are false, the Defendants, and each of them, knew or should have known that they were false when made, and were made by Defendants, and each of them, intentionally or with reckless disregard of the falsity of said statements.

72. That said statements have defamed and impugned Plaintiff in his occupation and profession, as a proximate result of which, Plaintiff is or may be precluded from practicing podiatry in any state outside of Colorado, will incur increased insurance costs, and will bear the stigma for the remainder of his life that his license to practice podiatry was suspended.

73. That as a proximate result of the foregoing, Plaintiff has incurred actual damages in an amount as yet undetermined but reasonably believed to be in excess of $1,000,000.

VII. FOURTH CLAIM FOR RELIEF

74. Plaintiff hereby incorporates and realleges by reference each and every allegation contained and set forth in Paragraphs 1 through 73 above, inclusive, as though fully set forth herein.

75. That the Defendants, and in particular, those named Defendants who voted to deny Plaintiff's request to be reinstated to his license to practice podiatry after the issuance of the Initial Decision by the Hearing Officer, have acted outrageously, in extreme bad faith and without any legal or factual justification for their actions. The exact names and identities of the Defendants to whom this allegation applies are unknown to the Plaintiff, although Plaintiff has made due inquiry to obtain said names and identities.

76. That the said Defendants, and each of them, have acted willfully and wantonly, with the intent that the Plaintiff incur extreme mental anguish and duress.

77. That Plaintiff has suffered, and will continue to suffer such duress, all to his damage in an amount as yet undetermined but believed to be in excess of $1,000,000.00.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in his favor and against the Defendants, and each of them, as follows:

1. For judgment in the amount of at least $1,000,000.00, subject to proof at trial, plus interest as provided by law;

2. For an award of reasonable exemplary damages in the amount of at least $5,000,000.00, against those Defendants who voted not to reinstate Plaintiff to his license to practice podiatry after the issuance of the Initial Decision by the Hearing Officer as set forth above;

3. For costs herein, expert witness fees, attorney fees as provided in 42 U.S.C. § 1988, and such other and further relief as to the Court seems just and proper in the premises.

4. Plaintiff prays that the member of the Inquiry Panel who voted on February 9, 1984 to restore Plaintiff to his license to practice be dismissed from this action.

5. Plaintiff prays that any member of the Hearing Panel who voted on February 10, 1984 to restore Plaintiff to his license to practice be dismissed from this action.

HOCHSTADT, STRAW & STRAUSS, P.C.

By: Jordan Hochstadt, #106
Richard S. Strauss, #7916
Attorney for Plaintiff
2043 York Street
Denver, Colorado 80205
(303) 329-9222

Plaintiff's Address:

5110 West 38th Avenue
Denver, Colorado 80216

STATE OF COLORADO)
) ss.
City and County of Denver)

AFFIANT, Lenord S. Horwitz, D.P.M., of lawful age and being first duly affirmed, deposes and says:

1. That he is the Plaintiff herein;

2. That he has read the above and foregoing Amended Complaint and that the matters set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ Lenord S. Horwitz
Affiant

The foregoing was duly acknowledged and affirmed before me this 12th day of July, 1984.

My commission expires: 12-8-85.

/s/ Rebecca Sue Gibson
Notary Public
2043 York Street
Denver, Colorado 80205

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I served the above and foregoing Amended Complaint upon the Defendants by depositing a true and correct copy of the same in the United States Mails, postage prepaid thereon, addressed to:

Thomas J. Lyons, Esq.
Assistant Attorney General
1525 Sherman Street, Second Floor
Denver, Colorado 80203

F. Michael Ludwig, Esq.
Wood, Ris & Hames
1775 Sherman Street
Denver, Colorado 80202

/s/ Rebecca Gibson
7-12-84

EXHIBIT A

THE STATE BOARD OF MEDICAL EXAMINERS
STATE OF COLORADO

STIPULATION AND ORDER

PEOPLE OF THE STATE OF COLORADO,
ex. rel. DUANE WOODARD, ATTORNEY GENERAL,

Complainant,

vs.

LENORD S. HORWITZ, D. P. M.

Respondent.

IT IS HEREBY STIPULATED by and between Inquiry Panel A of the State Board of Medical Examiners (hereinafter "Board") and Lenord S. Horwitz, D.P.M. (hereinafter "Respondent"), as follows:

WHEREAS, Respondent was licensed to practice podiatry in the State of Colorado on January 14, 1964; and

WHEREAS, On September 14, 1978, the First Formal Complaint was served upon the Respondent. The First Formal Complaint contained two counts and sought to impose sanctions upon the Respondent on the grounds that Respondent had been convicted of offenses involving moral turpitude, or were felonies. The Respondent had previously been convicted of 22 misdemeanor counts of knowingly and willfully making or causing to be made false statements in applications for Medicare benefits; and

WHEREAS, on May 26, 1981, a Second Formal Complaint was filed against the Respondent. The Second Formal Complaint contained one count and sought to impose sanctions upon the Respondent on the grounds that he had been guilty of gross negligence or ignorant practice of podiatry in the treatment of a named patient; and

WHEREAS, on June 19, 1981, a Third Formal Complaint was filed against the Respondent. The Third Formal Complaint contained four counts, and sought to impose sanctions upon the Respondent on the grounds that Respondent had been guilty of gross negligence or ignorant practice of podiatry in the treatment of four specified patients; and

WHEREAS, hearing before the Hearings Panel on the First Formal Complaint commenced on January 26, 1982. At the conclusion of Complainant's case, Respondent moved to dismiss, which motion was taken under advisement and then ultimately granted; and

WHEREAS, the Hearings Panel found in connection with the hearing on the First Formal Complaint, that the Podiatry Board might be biased against the Respondent,

and therefore, to avoid any taint upon the proceedings, the Hearings Panel elected not to consult with the Podiatry Board as is mandated by C.R.S. 1973, 12-32-104; and

WHEREAS, on April 16, 1982, Hearing Officer Michaels dismissed with prejudice, Count II of the Third Formal Complaint; and

WHEREAS, on August 2, 1982, hearing on Counts I and III of the Third Formal Complaint commenced, and on November 15, 1982, the Hearings Panel issued its written Order finding that Complainant had again failed to meet its burden of proof and dismissed Counts I and III of the Third Formal Complaint with prejudice; and

WHEREAS, Inquiry Panel A referred for hearing Count IV of the Third Formal Complaint and the Second Formal Complaint (hereinafter "Remaining Counts") to Hearing Officer Michaels, although hearing had been previously referred to the Hearings Panel; and

WHEREAS, there is presently pending for resolution, before Hearing Officer Michaels, an objection for such referral and a Motion to Dismiss setting forth various alleged deprivations of constitutional rights suffered by the Respondent; and

WHEREAS, counsel for Respondent and counsel for the Board have discussed all issues raised by the allegations set forth in the Remaining Counts, and it is the intent of this Stipulation and Order to provide for compromise and settlement of all such issues without the necessity of proceeding to a formal disciplinary proceeding wherein Respondent would have the opportunity to present any defenses to the allegations of the Remaining Counts; and

WHEREAS, the Board has the statutory responsibility and obligation to protect the public safety and welfare;

NOW THEREFORE, the following Stipulation is entered into and respectfully submitted for the purpose of allowing its terms to become an Order of the Board.

IT IS STIPULATED AND AGREED AS FOLLOWS:

* * *

5. . . . are or are not in accord with the standards for record keeping of other podiatrists practicing within the State of Colorado. In the event that the final report of the supervising podiatrist shall state that the record keeping of the Respondent is in accordance with the standards for record keeping of other podiatrists practicing within the State of Colorado, upon the receipt of such report, the Board shall enter an Order setting forth that the requirement for record-keeping supervision has been met. In the event that the final report of the supervising podiatrist shall state that the record keeping of the Respondent is *not* in accordance with the standards for record keeping of other podiatrists practicing within the State of Colorado, upon the receipt of such report, the Board may enter additional orders setting forth further requirements for record-keeping supervision as the Board in its sole discretion shall determine. Respondent shall have the right to seek review of such final report and any further order upon the basis of an abuse of discretion pursuant to C.R.S. 1973, 12-36-118, as amended, in an administrative hearing, conducted pursuant to C.R.S. 1973, 24-4-101, et. seq., as amended.

6. Respondent agrees that commencing with the effective date of this Stipulation and Order and for a period

of six (6) consecutive months thereafter, the State Board of Medical Examiners will have the right to appoint an ambulatory foot surgeon to supervise surgeries performed by the Respondent. The selection of the number of surgeries to be observed and which surgeries are to be observed shall be in the sole discretion of the supervising ambulatory foot surgeon; PROVIDED, HOWEVER, that Respondent shall only be obligated to pay the expense and costs of such supervision for a maximum of three (3) surgeries per week on a non-cumulative basis, during the said six-month period. Said supervising ambulatory foot surgeon shall file monthly written reports with the Board, within 15 days after the end of the preceding month, with a copy of such report being sent to Respondent, setting forth: (i) the types of surgery performed by Respondent which were observed by the supervising ambulatory foot surgeon; (ii) evaluation by the supervising ambulatory foot surgeon of the techniques and procedures employed by Respondent; and (iii) an evaluation by the supervising ambulatory foot surgeon as to whether or not Respondent's current ability to practice podiatry is consistent with generally accepted standards of podiatric care and with reasonable skill and safety to Respondent's patients. It is understood that such supervised surgeries may not be the basis of further disciplinary action, (i) unless the supervising ambulatory foot surgeon recommends against performing the proposed surgery or surgical technique and Respondent performs the proposed surgery against the recommendation of the supervising ambulatory foot surgeon; or (ii) unless the surgery is performed in a manner which is contrary to the provisions of C.R.S. 1973, 12-32-107 (3)(i), as amended, in the judgment of the supervising ambulatory foot surgeon. At the completion of said six-

month period, the supervising ambulatory foot surgeon shall file a final written report with the Board setting forth that the surgical practices of the Respondent are or are not in accord with the standards of other ambulatory foot surgeons and podiatrists practicing in the State of Colorado. In the event that the supervising ambulatory foot surgeon shall report that the surgical practices of the Respondent are in accordance with such standards, upon the receipt of such report, the Board shall enter an Order setting forth that the requirement for surgery supervision has been met. In the event that the final report of the ambulatory foot surgeon shall state that the surgical practices of the Respondent are *not* in accordance with such standards, upon the receipt of such report, the Board may enter additional orders setting forth further requirements for surgical supervision as the Board in its sole discretion shall determine. Respondent shall have the right to seek review of such final report and further order upon the basis of an abuse of discretion pursuant to C.R.S. 1973, 12-36-118, as amended, in an administrative hearing conducted pursuant to C.R.S. 1973, 24-4-101, et. seq., as amended.

7. The parties agree that the supervising podiatrist and the supervising ambulatory foot surgeon shall be selected from persons other than persons who have in any manner participated in any prior proceedings against the Respondent before this Board, including, but not limited to David Wolf, D.P.M., Thomas J. Benenati, D.P.M., David R. Buchler, D.P.M., Edward K. Raczka, D.P.M., William F. Hinesar, D.P.M., and all past and present members of the Podiatry Board.

8. In the event that the Inquiry Panel shall determine that there has been a violation of this Stipulation and Order

on the part of the Respondent, the issue of such violation and the discipline, if any, to be imposed as a result of such violation, if any, shall be referred for formal hearing pursuant to C.R.S. 1973, 12-36-118, as amended. In the event that a formal hearing is so conducted and the facts which constitute the alleged violation are not proven, no discipline shall be imposed by the Board and this Stipulation and Order shall remain in full force and effect. During the pendency of such formal hearing process or after a finding by the Inquiry Panel of a violation of this Stipulation and Order, performance hereunder shall not be stayed, modified or terminated.

9. Except as set forth herein, it is agreed that all Remaining Counts pending before the State Board of Medical Examiners shall be dismissed with prejudice.

10. That the State Board of Medical Examiners agrees that any conduct on the part of the Respondent occurring prior to July 1, 1983, shall not form the basis of any disciplinary action, informal or formal, to be taken by the State Board of Medical Examiners, (i) unless a Complaint in compliance with C.R.S. 1973, 12-36-118, as amended, if filed with the State Board of Medical Examiners by a patient of Respondent, regarding such conduct; or (ii) unless initiated by the Board itself, pursuant to C.R.S. 1973, 12-36-118 (4)(a), as amended, so long as the information upon which the Board bases its Complaint is not information which was received solely from any person identified in Paragraph 7 above, or from the office of the Attorney General. No formal Complaint shall be filed against the Respondent on account of such conduct until and unless the Inquiry Panel conducts an investigation into such allegations, which investigation shall be in compliance with the provisions of C.R.S. 1973, 12-36-118 (4)(a) and

(d), and such investigation includes as a minimum, an interview with the patient, and the Respondent, if they are reasonably available to the Board for such interview.

11. Respondent is fully aware of and understands his rights to a formal disciplinary hearing pursuant to C.R.S. 1973, 12-36-118, as amended, and hereby voluntarily waives those rights and requests that this Stipulation be accepted by the Board with the same force and effect as an order entered as a result of a formal disciplinary hearing.

12. Respondent agrees that during the six-month supervision period, as set forth in Paragraphs 5 and 6 hereof, that he shall use his best efforts to maintain his podiatric practice at the same level and of the same nature of practice as was maintained by him for the period of time commencing one year prior to the effective date as set forth in Paragraph 13.

13. The effective date of this Stipulation and Order shall be the day on which the designee of the Board executes this Stipulation and Order; PROVIDED, HOWEVER, with respect to Paragraphs 5 and 6, the effective date shall be August 10, 1983.

/s/ Leonard S. Horwitz
Respondent

/s/ Ray E. Piper, D.O.
Colorado State Board of Medical
Examiners, Inquiry Panel A

Effective Date: July 15, 1973

APPROVED AS TO FORM:

HOCHSTADT, STRAW & STRAUSS, P.C.

By: /s/ Jordan Hochstadt, #106
Richard S. Strauss, #7916
Attorneys for Respondent
2043 York Street
Denver, Colorado 80205
(303) 329-9222

FOR THE ATTORNEY GENERAL

By: /s/ Thomas J. Lyons, #8381
Assistant Attorney General
Regulatory Law Section
1525 Sherman St., 3rd Floor
Denver, Colorado 80203
(303) 866-3611

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing STIPULATION AND ORDER was sent via U.S. Mail, postage prepaid, to: Lenord Horwitz, D.P.M. c/o Hochstadt, Straw & Strauss, P.C., 2043 York St., Denver, CO 80205.

/s/ (Illegible)

APPENDIX H

BEFORE THE STATE BOARD OF
MEDICAL EXAMINERS
STATE OF COLORADO
Proceeding No. RG ME DAAED
ORDER OF SUMMARY SUSPENSION
IN THE MATTER OF DISCIPLINARY
PROCEEDINGS REGARDING THE LICENSE
TO PRACTICE PODIATRY OF
LENORD S. HORWITZ, D.P.M.,
Respondent.

TO: Lenord S. Horwitz, D.P.M.
5110 W. 38th Avenue
Denver, Colorado 80212

THIS MATTER having come before Inquiry Panel A of the Colorado State Board of Medical Examiners ("panel"), and the panel having reviewed its entire file in this matter and being otherwise fully advised in the premises, DOES FIND AS FOLLOWS:

1. Respondent was licensed by the Board of Medical Examiners of the State of Colorado ("board"), to practice podiatry within the State of Colorado on January 14, 1964 and was so licensed at all times relevant hereto.

2. The panel, by virtue of respondent's licensure, has jurisdiction over respondent and over the subject matter of this action.

3. Reasonable grounds exist to believe that respondent has engaged in unprofessional conduct in violation of the Podiatry Practice Act, specifically C.R.S. 1973, 12-32-107(3)(i), as amended in 1983, ("an act or omission constituting grossly negligent conduct of the practice of poditary or two or more acts or omissions which fail

to meet generally accepted standards of the practice of podiatry."

4. The panel received a report containing the following:

a. On or before December 7, 1983, respondent formed a podiatrist-patient relationship with V. Mc., patient No. 1135, a male with a hammer toe condition on the second toe of his right foot.

b. On or about December 7, 1983, respondent was scheduled to perform a surgical procedure on the right foot of V. Mc. in the office of respondent. At the same time the medical records of respondent for this patient contained no clear indication as to which toe of V. Mc. was to be operated upon, mention being made in different parts of the medical records of the second, third, fourth and fifth toes, each mentioned as being in the hammered condition necessitating surgery.

c. On or about December 7, 1983, patient V. Mc. was in the offices of respondent, was prepared for surgery and surgical drapes were in place on his right foot. Prior to that time, no preoperative radiographs (x-rays) of the right foot of V. Mc. were taken by respondent or available to respondent. Before proceeding with the surgery from this point, radiographs of the right foot of V. Mc. were obtained by respondent.

d. On or about December 7, 1983, in the course of performing his preparations for and surgery on patient V. Mc., respondent engaged in multiple acts contrary to sterile techniques, including his scrubbing, gowning and gloving for surgery while wearing a ring. Other examples of sterile technique failures on that date by respondent

included brushing sterile apparel of respondent against nonsterile areas of the room where the operation was occurring and the contamination by respondent of the sterile field with nonsterile equipment and articles.

e. On or before December 7, 1983, the medical records of respondent for patient V. Mc. contained inconsistent indication that V. Mc. suffered medical problems, took medications or underwent prior surgery. Prior hospitalizations were required for V. Mc. as disclosed by V. Mc. to respondent but not noted in the medical record for V. Mc. created by respondent on or before December 7, 1983. V. Mc. was also taking a diuretic medication on or about December 7, 1983, a fact not noted in the medical record for V. Mc. created by respondent on or before that date.

f. On or before November 23, 1983, respondent formed a podiatrist-patient relationship with R. W., patient No. 1132, an elderly male with a chief complaint of a corn on the tip of his third toe, right foot, secondary to a hammer toe.

g. On or about November 23, 1983, respondent was scheduled to perform a surgical procedure on the right foot of R. W. in the office of respondent. At the same time, the medical records of respondent for R. W. included an informed consent form containing a description of the hammer toe correction procedure and the signature of R. W. The name, date, time, associated risks or complications, and witness portions of the informed consent form were not completed and were blank.

h. On or about November 23, 1983, respondent performed a surgical procedure to correct the hammer toe

deformity on the third toe of the right foot of R. W. Thereafter, respondent proceeded to perform a secondary surgical procedure on the third toe of the right foot of R. W., removing a portion of the distal phalanx, which removal was unnecessary due to the initial surgical procedure performed on this toe.

i. In the course of performing the surgical procedure described in paragraph h above, respondent was responsible for multiple breaks in sterile technique, including the brushing of sterile apparel of respondent against nonsterile areas surrounding the operating field and contamination of the operating field by respondent with nonsterile equipment or articles.

j. After concluding the surgical procedures described in paragraph h above, on November 23, 1983, the medical records prepared by respondent for R. W. did not contain any mention of the secondary surgical procedure described in paragraph h above and performed by respondent.

k. On or before November 23, 1983, respondent formed a podiatrist-patient relationship with R. B., patient No. 1120, an older female scheduled to undergo foot surgery on November 23, 1983, in the office of respondent.

l. On or about November 23, 1983, the medical records of respondent for R. B. included a preoperative informed consent to surgery form that did not include a date, time, name, description of associated risks and complications, or the name of a witness.

m. On or about November 23, 1983, the respondent performed a surgical procedure to correct a hammertoe on the fourth and fifth toes of the right foot of R. B.,

using at least one piece of equipment that was not introduced into the operative field in an appropriate fashion and thereby caused a break in the sterile technique of respondent.

n. Prior to November 23, 1983, respondent formed a podiatrist-patient relationship with M. B., patient No. 1049, a male upon whom foot surgery was performed by respondent prior to November 23, 1983.

o. On or about November 23, 1983, the medical records of respondent for M. B. contained no indication that M. B. suffered from infection, while noting that a culture was taken from the surgical site on that date.

p. On or about November 23, 1983, visual observation of the feet of M. B. revealed classical signs of post-operative infection at the site of a surgical wound, including purulent exudate, edema, erythema and extending cellulitis.

q. On or about November 23, 1983, respondent obtained a culture specimen from the surgical wound on the foot of M. B. utilizing improper technique, including the use of an unsterile swab, contamination of the swab, placement of the specimen on an improper testing media and the failure to incubate the testing media and specimen in a timely fashion. In addition, other appropriate laboratory studies associated with infection investigations were not done by respondent on November 23, 1983.

r. On or about November 23, 1983, respondent increased the antibotic dosage being prescribed by respondent to M. B. beyond the recommended dosage levels for that antibotic, Cefadroxil, when used for the purposes prescribed by respondent here.

s. On or about November 23, 1983, the medical records prepared by or for respondent for M. B. contain no reference to the renal status of M. B., no reference to the potential allergies of M. B., and no reference to the antibotic or dosage prescribed by respondent. Up to and including December 7, 1983, the medical records prepared by or for respondent for M. B. contained no reference to the culture taken November 23, 1983 or the results thereof.

t. On or before November 16, 1983, respondent formed a podiatrist-patient relationship with H. R., patient No. 1088, a younger female.

u. On or about November 16, 1983, H. R. was present in the office of respondent and was requested to fill out her own surgical consent form which she did. In addition, H. R. presented to respondent on or before that date standard weight bearing radiographs of her feet taken by a different podiatrist and indicating a normal first metatarsal and proximal phalanx on her right foot.

v. On or about November 16, 1983, respondent, in his office, performed "corrective" surgical procedures on the first metatarsal and proximal phalanx on the right foot of H. R.

w. On or about November 16, 1983, respondent, in his office, performed an "excision of neuroma" between the third and fourth toes on the right foot of H. R., in a location and at a depth of surgical site that was inconsistent with the normal anatomical location of neuromas. Immediately following this procedure, H. R. continued to experience symptoms and without obtaining written informed consent, respondent proceeded to perform

an osteotomy procedure on the fourth metatarsal of the right foot of H. R.

x. At the conclusion of the procedures described in paragraphs v and w above, respondent used a hypodermic needle to introduce local anesthesia into the surgical sites on the right foot of H. R. and, in order to obtain additional anesthesia for H. R., thereafter reinserted the same hypodermic needle into a multi-dose vial of local anesthesia, thereby contaminating said vial and the contents of same.

y. On or about November 16, 1983, the medical records of respondent for H. R. contained an inaccurate representation of the indications and procedures existing and performed by respondent that date.

z. On or before November 23, 1983, respondent formed a podiatrist-patient relationship with R. O., patient No. 1018, a middle-aged female.

aa. On or about November 23, 1983, respondent performed surgical procedures on the right foot of R. O., including a medical plantar fascia release, hammertoe corrections on the second and third toes, a hemiphalangectomy on the distal second toe and a ostestomy on the second metatarsal. During this procedure, multiple failures in the sterile technique of respondent occurred, including the brushing of sterile apparel of respondent against nonsterile areas surrounding the operating field and contamination by respondent of the operating field with nonsterile articles or equipment.

bb. At the conclusion of the surgical procedure performed by respondent on R. O., respondent used a hypo-

dermic needle to introduce local anesthesia into the surgical site on the foot of R. O. and, in order to obtain additional anesthesia for R. O., thereafter respondent reinserted the same hypodermic needle into a multi-dose vial of local anesthesia, thereby contaminating said vial and the contents of same.

cc. On or about November 23, 1983, the medical records prepared by respondent for R. O. contained no indication that R. O. suffered from cardiovascular disease, past myocardial infarction, past hospitalizations or took present medications. R. O. in fact possessed a significant past history of cardiovascular disease unreflected in the medical record on her prepared by respondent on November 23, 1983.

5. The panel specifically finds that it has reasonable grounds to believe that respondent's demonstrated lack of podiatric knowledge as set forth in paragraph 4 above constitutes such a threat to any present and future patients of respondent, and thus to the public health, safety and welfare, as to imperatively require emergency action, to wit, the summary suspension of respondent's medical license pending disciplinary proceedings as authorized by C.R.S. 1973, 24-4-104(4).

THEREFORE, IT IS HEREBY ORDERED that the license of Lenord S. Horwitz, D.P.M. to practice podiatry in the State of Colorado be and hereby is summarily suspended pending a final determination of whether respondent's license to practice podiatry in the State of Colorado should be suspended or revoked pursuant to the provisions of C.R.S. 1973, 12-32-107, as amended in 1983;

And pending the outcome of said proceedings, IT IS HEREBY FURTHER ORDERED that Lenord S. Horwitz, D.P.M. cease, desist and refrain from any further acts for which a license to practice podiatry is required by the laws of the State of Colorado.

DATED this 21st day of December, 1983.

APPENDIX I

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS
STATE OF COLORADO

Proceeding No. RG ME DAAED

INITIAL DECISION

PEOPLE OF THE STATE OF COLORADO *ex rel.* DUANE WOODARD, ATTORNEY GENERAL,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

Hearing was held in this matter on January 19, 20, 23, 24 and 25, 1984 before Marshall A. Snider, hearing officer, Department of Administration, Division of Hearing Officers. Complainant was represented by Thomas J. Lyons and William Higgins, Assistant Attorneys General. Respondent was present at the hearing and was represented by Jordan Hochstadt and Richard S. Strauss. Pursuant to C.R.S. 24-4-105 (14) the hearing officer renders the following Initial Decision.

FINDINGS OF FACT

1. Respondent was licensed by the Colorado State Board of Medical Examiners ("the Board") to practice podiatry on January 14, 1964 and has been so licensed at all time relevant to these proceedings.

2. On July 15, 1984 Respondent and the Board entered into a Stipulation in order to settle certain pending

disciplinary matters. The Stipulation provided for Respondent to be supervised by an independent ambulatory foot surgeon for a period of six months from September 1, 1984. The areas of supervision were Respondent's record keeping and surgical practices. Stephen F. Albert, D.P.M. ("Albert") was selected as the supervising podiatrist and served in this capacity until December 12, 1983.

3. On December 21, 1983 the Board summarily suspended Respondent's license to practice podiatry. The summary suspension was based on the same facts which form the basis for the charges in the instant case.

4. Respondent practices percutaneous and minimal incision surgery. Percutaneous surgery involves the making of a very small incision—a puncture—to perform surgery. Minimal incision surgery involves the making of a slightly larger, but nonetheless small, incision. These types of foot surgery are distinguishable from what is known as "traditional" foot surgery. In traditional surgery, usually performed in hospitals under hospital protocol, large incisions are made to expose tissues, ligament and bones. Percutaneous and minimal incision surgery, by reducing the damage to underlying tissue, generally result in less convalescence than traditional surgery. While many practitioners around the country perform percutaneous and minimal incision surgery, these surgeries are not performed by a large number of podiatrists in Colorado. Many podiatrists disagree with the concept of percutaneous or minimal incision surgery.

5. Generally accepted standards of the practice of podiatry (referred to in this decision as "the standard of care") are national in scope. The same standards apply in Colorado as apply in the rest of the country.

6. The sterile field (the area in and around the surgery in which strict standards of sterility must be observed) differs in the different types of surgery discussed above. In traditional surgery the sterile field consists of the foot and an area defined by a 12 inch radius around the foot. In minimal incision surgery the sterile field consists of the foot and anything it touches. In percutaneous surgery the sterile field is the incision and anything that goes into it. Podiatrists have a difference of opinion on this subject and many podiatrists, including Albert, believe that the sterile field is that described for traditional surgery, regardless of the type of foot surgery being performed. Based upon all of the evidence, however, the hearing officer finds that the sterile field differs for each type of surgery, as described above.

7. Respondent used multi-dose vials of xylocaine, a local anesthetic, in his surgeries. On occasion Respondent would inject patient with xylocaine and insert the same hypodermic needle used in that injection into a multi-dose vial, thus contaminating the vial and its contents. If the contents of the same vial were injected into another patient the contamination would be passed on to the other patient. If the vial were used on the original patient there would be no contamination: in essence, the original patient would be receiving his own germs back. There was no evidence that Respondent ever utilized a multi-dose vial of xylocaine to inject one patient and then used that same vial on a second patient. Once contaminated, such vials and their contents are capable of being re-sterilized.

8. Respondent generally dictated his patient records on tape and a secretary typed these records overnight. The records would be placed on Respondent's desk, usually

the next morning, and Respondent's practice was to dictate or interlineate any changes or corrections and return the records to the typist. On some occasions this correction process would be repeated after the second draft was reviewed.

9. On December 7, 1983 Albert removed copies of certain patient records from Respondent's office to assist in preparing his report to the Board. Albert was aware that some of these records were incomplete and might be modified before becoming part of the final patient records

10. On December 7, 1983 Respondent's typist did not finish all of the charts presented to her since Respondent was to be leaving on a vacation December 21 and the typist planned to catch up on the typing during that period.

11. On November 23, 1983 Respondent performed surgery on patient R.B. During the course of the surgery the drill used by Respondent broke. Respondent's assistant brought Respondent new drill and cord which had been sterilized and wrapped in an outer cloth and two inner cloth packs that were sterilized with the drill and the cord. The assistant's hands were not gloved when she brought in this cord and drill.

12. Prior to surgery on R.B. Respondent discussed with R.B. the nature of the surgery and possible risks and complications resulting from the surgery. R.B. understood the matters explained to her. R.B. signed a written Informed Consent to Surgery form which described the procedure to be performed but did not set forth the date and time, patient's name, signature of a witness or a specification of possible risks and complications.

13. On November 16, 1983 Respondent performed surgery on patient M.B. Patient M.B. has no problem with

his kidneys and never mentioned any such problem to Respondent. M.B.'s Patient History, prepared prior to the date of surgery and signed by M.B., indicates that M.B. has no kidney disease. No evidence was presented by Complainant regarding the potential allergies of M.B. alleged in the Formal Charges.

14. On November 23, 1983 M.B. presented himself to Respondent with signs of infection at the site of his surgery. Respondent increased M.B.'s prescription for cefadroxil, an antibiotic, from one gram (1000 mg.) to 1500 mg. per day. M.B. never took the increased dosage. Many practitioners will not prescribe more than 1000 mg. of cefadroxil daily, although some practitioners choose to treat infections aggressively and will prescribe in excess of 1500 mg. of that drug daily.

15. On November 23, Respondent took a culture from the exudate (the material excreted by the wound) in the site of the suspected infection on M.B.'s foot. The testimony regarding this procedure was conflicting. Considering all of the evidence the hearing officer finds that the swabs used to take the culture were kept in a sack and that the sack and swabs were sterilized one or two times per week. The sack and swabs were kept in a container that Albert did not believe could be sterilized. Respondent's assistant testified that the container was in fact sterilized once or twice a week. There was no direct evidence that the swabs were not sterile and the hearing officer finds that the swabs were, in fact, sterile.

16. There was also a conflict in the evidence as to whether Respondent dragged the swab across M.B.'s foot before taking the culture, thus contaminating the swab.

It was possible that a germicide used in dressing the wound would kill any germs on the swab even if the swab did contact the foot. If the swab touched either the foot or the germicide the culture results would be invalid. Albert apparently did not mention to Respondent that the swab may have been contaminated, and he could be expected to do so since Respondent could easily have used a new swab. Considering all of the evidence the hearing officer concludes that Complainant has not proved by a preponderance of the evidence that the swab was contaminated by being brought into contact with M.B.'s foot.

17. Once the culture was taken from M.B.'s wound the culture plate upon which it was placed remained exposed to the air for one to three hours bfore being incubated. Some bacteria will live as long as six hours before being incubated, but the longer the plate sits before incubation the more chance that organisms will die and invalidate the results of the culture. Respondent made no specific effort to have the culture plate placed in an incubator. The plate merely sat on a counter until Respondent's assistant noticed it and placed it in an incubator.

18. There was no evidence regarding the allegations of the Formal Charges that the culture medium was improper or that appropriate laboratory studies were not undertaken.

19. M.B.'s patient records copied by Albert on December 7 make no reference to the culture or the increase in the amount of cefadroxil prescribed for M.B. Respondent's final records include such references.

20. On December 2, 1983 Respondent performed surgery on the second toe of the right foot of patient V. Mc.

Patient records of V. Mc. copied by Albert on December 7 made refernce to the affected toe as the third, fourth and fifth toe in various places but all of these references were struck over to indicate the second toe. One of these changes was made on the patient's Informed Consent to Surgery form and pointed out to the patient. Other incorrect refernces were in Respondent's dictated notes. The final version of the patient records reference the correct toe.

21. Prior to the commencement of surgery on V. Mc. there were no available x-rays. The patient was prepared for surgery and surgery was about to commence when Albert pointed out the absence of x-rays to Respondent. X-rays were then taken. While Respondent denies that he was about to start surgery without x-rays, he has no independent recollection in this regard and his denial was based upon statements made to him by his assistant, who did not testify on this point.

22. In all surgeries observed by Albert Respondent scrubbed while wearing a plain gold wedding band and wore the ring under sterile gloves. The ring did not touch the patient or any surgical instrument and did not puncture the glove. The ring did not cause a breach of sterility. Although Albert saw Respondent wear this ring in each surgery he reported it only in connection with the surgery on V. Mc.

23. Albert testified that in the surgery on V. Mc. Respondent came in contact with non-sterile objects (the back of a television set used to distract and entertain patients undergoing surgery and the edge of an adjacent tray). There was no evidence as to what part of Respondent's body or clothing touched these objects or whether

the part of Respondent's body or clothing touching the objects entered the sterile field for percutaneous or minimal incision surgery.

24. Respondent's initial notes on patient V. Mc. contained no mention of prior surgeries of V. Mc. These prior surgeries are listed on the Patient History signed by V. Mc. on November 18. The Patient History also reflects that V. Mc does not suffer from gout or hypertension and is not taking medications. V. Mc. signed this form and there is no evidence that V. Mc. ever told Respondent about these matters or that Respondent failed to inquire about them.

25. On November 23, 1983 Respondent performed surgery on patient R.O. Respondent has know R.O. over fifteen years, and was familiar with the facts that R.O. had suffered a heart attack and was taking medication for a heart condition. The most recent records for R.O. do not contain this information although records prepared in 1982 do so. The Patient History filled out by R.O. in August, 1983 reflects her heart condition.

26. There was a conflict in the testimony of Albert and Dr. Robert Timm, who also observed the surgery on R.O., as to whether the sleeve of Respondent's gown touched the television set or its stand, thus rendering the gown unsterile. The testimony also differed as to whether the cord of the drill used in this surgery touched non-sterile objects. Because Respondent would have had to reach up and out over three feet to touch his sleeve on the television or its stand, a physically difficult action, and because Dr. Timm did not observe this happening, the hearing officer concludes that it has not been proven that

the gown was contaminated in this fashion. In any case, Albert apparently never pointed out this alleged contamination of the gown to Respondent: the problem could have been easily remedied by a change of gowns. There was no evidence that the cord of the drill or the sleeve of the gown entered the sterile field.

27. On November 16, 1983 Respondent performed foot surgery on patient H.R. Respondent removed a bunion (an enlarged portion of bone) from the large toe on the right foot of H.R. H.R. also had a condition on the large toe of her right foot known as a Hallux Valgus condition. In this condition the toe has an "L" shape and the end of the toe points toward the other toes. The Hallux Valgus condition was a mild one, but there was a conflict in the testimony as to whether the affected toe was so far out of acceptable limits for this condition that surgery was necessary. Albert testified that the toe was in the acceptable range (0-8 degrees out of line) while Respondent testified that the normal range is 0-5 degrees and that H.R.'s toe was 10-12 degrees out of line. An x-ray that may have clarified the extent of the condition was not available at the hearing, through no fault of either party. Respondent straightened this toe by cutting the bone, a procedure known as an osteotomy. Albert never disagreed with Respondent's performing the osteotomy until after the fact.

28. H.R. also complained of a burning sensation between the third and fourth toes on her right foot. This symptom is consistent with two possible conditions: a neuroma (the enlargement of or a growth on a nerve) and a nerve compression (a nerve which is being impinged

or squeezed). The treatment of choice for a neuroma is to excise the neuroma and Albert agreed with this diagnosis and the performance of an excision. The breaking of the bone to relieve pressure on the nerve (an osteotomy) is an accepted procedure for treating a nerve compression.

29. Respondent made an incision for the purpose of excising a neuroma and found no neuroma. Albert testified that the incision was not sufficiently deep and that Respondent appeared, therefore, not to know the location of a neuroma. Albert suggested to Respondent that he cut deeper but Respondent stated that he had performed the procedure in the correct manner. The hearing officer finds that there was insufficient proof that Respondent failed to perform this procedure in the correct manner by failing to make a sufficiently deep incision. First, Respondent performed the surgery while Albert only observed. Second, excision of neuroma is a well known technique which Respondent has performed hundreds of times. While the Board has charged Respondent with performing unnecessary surgery, with record keeping violations and with breaks in sterile technique, this is the only charge that he is substandard in his surgical technique. It is not credible that a practitioner with Respondent's years of experience, whose surgical technique appears adequate, would not know the location of a suspected neuroma. After hearing the evidence even the hearing officer knows the approximate depth at which a neuroma might be located and it is unlikely that Respondent would, while being observed by a Board appointed supervisor, make as gross an error as to make only the superficial incision claimed by Albert.

30. After the above procedure failed to reveal a neuroma in Respondent's opinion, H.R. complained that the burning sensation she had complained of still existed. Respondent then discussed with H.R. the performance of an osteotomy on her fourth toe, since Respondent now thought that the problem was an impingement. Respondent explained this additional surgery and the risks associated with it to H.R. Although H.R. had been administered nitrous oxide and was quite apprehensive throughout the surgery, she was fully awake, rational and coherent at this time, and fully understood the situation. H.R. gave Respondent her informed, knowing consent to perform the osteotomy on her fourth toe. H.R.'s current condition in this regard is very good and the surgery has served its purpose of relieving her pain.

31. On November 23, 1983 Respondent performed surgery on patient R.W., an 84 year old male, to correct a hammertoe condition. The written Informed Consent to Surgery form signed by R.W. listed only the procedure to be performed when R.W. signed it. The date, time, patient's name and the section of the form on risks and complications were not filled in when the form was signed. Respondent did explain to R.W., prior to the surgery, the procedure and associated risks and complications.

32. After surgically correcting the hammertoe condition, Respondent removed an exostosis (a growth of calcium or bone) from the end of the third toe of R.W.'s right foot. The exostosis was of long standing duration.

33. Albert testified that the sleeve of Respondent's gown and the cord of the power drill touched non-sterile objects such as the television stand, x-ray stand and the

patient's adjacent foot. Dr. Timm did not observe the cord touching anything non-sterile. For this reason, and the reasons set forth in paragraph 26 of these Findings of Fact, the hearing officer finds no break in sterility in this regard. Albert acknowledges that Respondent was unaware of the alleged breaks in sterility, and a comment from Albert would presumably have rectified the situation and maintained sterility.

34. The records taken by Albert on December 7 regarding patient R.W. did not mention the exostosectomy. The permanent records for this patient do reference this procedure.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent and his license to practice podiatry. Respondent moved to dismiss the charges on the grounds that the Board lacked jurisdiction. The basis of the motion was that the Board summarily suspended Respondent's license without complying with the investigatory procedures required by C.R.S. 12-36-118(4) (applicable to podiatrists under the provisions of C.R.S. 12-32-107(2)). The hearing officer denied this motion at the close of the evidence. The Administrative Procedure Act [C.R.S. 24-4-104(4)], as interpreted in *Colorado State Board of Medical Examiners v. District Court,* 191 Colo. 158, 551 P.2d 194 (1976) specifically permits the summary suspension of a license under the Medical Practice Act. In that decision the Court upheld a summary suspension even though such a suspension was accomplished without adhering to specific hearing procedures existing in the Medical Practice Act at

the time of that decision. The court specifically rejected the physician's argument that the summary suspension provision of the Administrative Procedure Act did not apply in light of the provisions of the Medical Practice Act.

Respondent acknowledges that the Board must, in extreme cases, have the power to summarily suspend licenses to protect the public, even if Section 118 (4) is not complied with. Respondent argues, however, that this case is not sufficiently extreme. The hearing officer declines the invitation to engage in this type of line drawing. It is for the Board, not the hearing officer, to determine in its discretion if sufficient cause for a summary suspension exists. If, as Respondent acknowledges, a summary suspension may be issued in some cases without following Section 118(4), then a summary suspension may issue in all cases without following this procedure.

2. Respondent moved to dismiss the charges at the close of complainant's case. The hearing officer reserved ruling on that motion and now denies it.

3. Respondent did not deviate from the standard of care in reinserting needles in multi-dose vials of anesthetic (all references to the "standard of care" in these Conclusions of Law are references to the standard set forth in C.R.S. 12-32-107(3)(i). There was no evidence in this case concerning "grossly negligent conduct", and these Conclusions of Law thus are limited to whether Respondent failed to meet generally accepted standards of the practice of podiatry). It was undisputed that unless the anesthetic were injected into a subsequent patient there would be no harm, and re-using the vial on the same patient would not violate the standard of care. The better pro-

cedure appears to be to use a separate drawing needle to withdraw the drug and a second needle to inject patients. This procedure prevents the possibility of harm to a subsequent patient by a practitioner accidentally using a vial that had not been re-sterilized. However, in this case no subsequent patient was injected. The standard of care does not require the best procedure possible in all cases. While this better procedure may be suggested to Respondent (which could have been done as part of the supervision), the hearing officer does not believe Respondent is subject to discipline for using a procedure that does not involve an unreasonable risk to patients and would only cause a risk to patients if Respondent were later negligent in his subsequent use of the vial. If, as Albert testified, reinsertion of the needle into the vial and then the same patient does not violate the standard of care, it cannot be said that the mere reinsertion of a needle in a multidose vial, by itself, violates the standard of care.

4. The use of written Informed Consent to Surgery forms is not mandated by the standard of care. While this may be the common practice, it bears no relationship to the care of the patient. What is required is that the patient be fully informed and this was done in all cases, although not in writing. The use of a written form serves more to protect the practitioner than the patient and is required by hospitals and malpractice carriers rather than by any standard of care. The improper completion of these forms may have been a good subject for the supervisory podiatrist to discuss with Respondent, but it does not violate the standard of care.

5. Respondent properly informed all of the patients at issue in this case regarding the procedures and their risks

and complications. Thus, Respondent met the standard of care in regard to receiving informed consent.

6. The incorrect references to the toe of patient V. Mc. to be operated on were all contained in notes which were not final. There is insufficient evidence of a deviation from the standard of care in respect to these entries.

7. The failure of Respondent to have available x-rays of V. Mc. until he had virtually started the surgery is such a major oversight as to constitute a deviation from the standard of care.

8. There was insufficient evidence to meet the burden of proof that Respondent had acted contrary to sterile technique in the surgeries performed on V. Mc., R.O. and R.W. Even if the evidence were sufficient to show that Respondent or the drill cord had touched non-sterile objects, there was no evidence that the sterile field had been violated. In rendering an opinion that the sterile field had been violated Albert applied the definition of the sterile field applicable to traditional surgery, including the 12 inch radius around the foot. The hearing officer has found, however, that this sterile field is not applicable to minimal incision and percutaneous surgery.

9. It is not a deviation from the standard of care in percutaneous or minimal incision surgery for Respondent to wear a ring under sterile gloves. Albert's opinion is basically that to do so is not an accepted technique, but such a determination does not render the wearing of a ring to be a violation of a standard of care. There is no evidence that wearing the ring constitutes any unreasonable or unacceptable risk to a patient.

10. There was insufficient evidence to support the claim that Respondent deviated from the standard of care by improperly maintaining patient records regarding the medical history of patient V. Mc. Albert testified that V. Mc. told Albert that V. Mc. suffered from certain conditions and took certain medication. V. Mc's Patient History negatives these matters. There was absolutely no evidence that V. Mc. advised Respondent of these matters or that Respondent failed to make proper inquiry.

11. The exostosis on the toe of patient R.W. was of long-standing duration and the patient was elderly. While Albert was of the opinion that the exostosectomy was unnecessary, Dr. Timm testified that under these conditions such a procedure is an acceptable procedure which is often necessary, in addition to the hammertoe correction, to relieve pain. There was insufficient evidence from which the hearing officer can conclude that removal of the exostosis was unnecessary and therefore no deviation from the standard of care has been proven.

12. There was insufficient evidence to conclude that the preliminary records regarding surgery on R.W. were any more than a first draft. The failure of these records to reflect the exostosectomy procedure does not violate the standard of care.

13. There is no evidence that the second drill used in the surgery of R.B. became contaminated and no violation of the standard of care has been shown in this regard. While Respondent's assistant was not gloved, she never directly touched or contaminated the drill or cord.

14. With regard to the culture taken from the wound of patient M.B. the hearing officer has found that the

swab was sterile and no violation exists on that point. However, Respondent did violate the standard of care by leaving the culture plate to stand exposed to the air for a period of one to three hours without giving any instructions to his assistant to incubate the culture and without taking steps to do so himself. The very bacteria sought to be identified by this procedure could die as a result of this delay and Respondent gave little thought to expeditiously incubating the culture. Had his assistant not entered the room to clean it up when she did the plate may not have been incubated until even more time had passed. Such inattention to the need for prompt incubation violates the standard of care.

15. The failure of the initial records on M.B. to mention the culture or a change in prescription may have been no more than errors in a draft. The evidence was insufficient to support a claim that Respondent maintained inaccurate records.

16. There was no evidence that M.B. suffered from kidney disease and his Patient History reflects this fact. There was no deviation from the standard of care in maintaining medical records in this regard.

17. There was insufficient evidence that the increase in medication prescribed for M.B. deviated from the standard of care. While Albert testified that the amount prescribed was more than practitioners usually prescribe, Dr. Timm testified that some practitioners might prescribe even greater dosages. In any event, Albert's testimony was general and did not take into account the specific needs and condition of patient M.B.

18. There was insufficient evidence to conclude that the osteotomy procedure performed on patient H.R.'s large toe was unnecessary. The evidence was insufficient to determine whether the Hallux Valgus condition was in or out of acceptable limits. Albert concluded that there was insufficient radiological evidence to perform this procedure, but the x-ray which may have possibly resolved this evidentiary conflict was not in evidence. Since Complainant had the burden of proof on this issue, as on all other factual issues, it cannot be concluded that Respondent deviated from the standard of care.

19. The hearing officer has found that the procedure to excise the neuroma in the surgery of H.R. was properly performed. Since that procedure was accomplished properly, the existence of continued pain in the patient's foot made it reasonable for Respondent to consider other causes, such as a nerve compression, for H.R.'s pain. The osteotomy performed is the accepted procedure for dealing with H.R.'s condition and no deviation from the standard of care was proven as to this procedure. H.R. gave a knowing and informed consent to this procedure and there is no requirement that this consent be in writing.

20. Respondent is charged with maintaining inaccurate records reflecting the x-rays that were in Respondent's office prior to the surgery on H.R. There is absolutely no support in the evidence for this charge.

21. Although Respondent's most current records for patient R.O. do not reflect her condition, her recent Patient History form does so. The hearing officer concludes that the standard of care requires Respondent to keep his records current in this regard since he cannot rely on his

memory of the condition of every patient. Even though the Patient History completed by R.O. on August 30, 1983 reflects her heart condition, if R.O. had neglected to recall or adequately report her condition on that history, Respondent had no current records to reflect that fact. In the case of R.O. Respondent relied on both his memory and that of his patient to inform him of her condition. Fortunately, both memories served in this case. But the hearing officer concludes that this form of "record keeping" raises an unreasonable risk of harm to a patient and is below the standard of care.

RECOMMENDED ORDER

The violations of C.R.S. 12-32-107(3)(i) found in this case are relatively minor compared to the overall charges. Nevertheless, the violations found in paragraphs 8 and 15 are fairly serious deviations from the standard of care. Respondent's license has already been suspended for approximately seven weeks and such a suspension is more than sufficient discipline for the violations proven. Other areas of Respondent's practice, while not found to be substandard, could be improved. However, these improvements should be dealt with under the supervisory structure established by the Stipulation.

It is the recommendation of the hearing officer that Respondent's license be immediately reinstated, that no further discipline be imposed as a result of these charges, and that Respondent continue under supervision pursuant to the Stipulation.

/s/ Marshall A. Snider
Hearing Officer

DATED: In Denver, Colorado
February 6, 1984

APPENDIX J

BEFORE THE STATE BOARD OF
MEDICAL EXAMINERS
STATE OF COLORADO

Proceeding No. RG ME DAAED

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

PEOPLE OF THE STATE OF COLORADO *ex rel.*
DUANE WOODARD, ATTORNEY GENERAL,

Complainant,

vs.

LENORD S. HORWITZ, D.P.M.,

Respondent.

Panel B of the Colorado State Board of Medical Examiners, having reviewed the transcripts of the hearing and the exhibits and the findings of fact and conclusions of law recommended by the hearing officer, FINDS AND CONCLUDES:

1. It has jurisdiction.

2. The Board affirms the findings of fact of the Initial Decision with the exception of:

> Finding #15—the Panel finds that the weight of evidence supports findings of fact that the procedure and technique used by Dr. Horwitz did not render such swabs sterile and constituted acts and omissions which failed to meet generally accepted standards of medical care.

3. The Panel affirms the conclusions of law with the following exceptions:

a. #14 is divided into 14(a) regarding the swab; and #14(b) regarding the incubation of the culture.

Regarding 14(a)—the Panel concludes that Dr. Horwitz' procedure and technique in the use of swabs does not insure that the swabs are sterile and single and is a violation of the standard of care.

b. The Panel specifically affirms the conclusion of law of #14(b) that Dr. Horwitz inattention to the need for prompt incubation of a culture violates the standard of care.

c. Regarding #7—the Panel specifically affirms that the failure of Dr. Horwitz to have patient V.Mc.'s x-rays available until he had virtually started surgery is a major oversight constituting a deviation from the standard of care.

4. The temporary, emergency suspension of Dr. Horwitz' license to practice podiatry previously ordered by Panel A should be terminated.

5. Dr. Horwitz' substandard medical procedures referred to in this order and in the order of the hearing officer are a danger to the public.

6. Dr. Horwitz should be granted probation on the condition of supervision of his podiatric practice by one or more podiatrists approved by the Panel and on condition that Dr. Howritz commit no acts or omission that constitute substandard medical care during the period of his probation.

7. Until such supervisory podiatrist or podiatrists are approved by the Panel Dr. Horwitz' license to practice podiatry should be suspended.

8. If no podiatrist approved by the Board can be recruited for the purpose of supervising Dr. Horwitz'

podiatric practice, Dr. Horwitz' license to practice podiatry should be suspended indefinitely.

NOW, THEREFORE, IT IS ORDERED:

1. That the summary suspension of Dr. Horwitz' license to practice podiatry previously ordered by Panel A be, and it hereby is, terminated.

2. That Dr. Horwitz be, and he hereby is, granted probation for period of one year on the conditions that during this period of time his practice of podiatry be supervised by one or more podiatrists approved by the Panel and that he commit no substandard acts or omissions in his podiatric practice during that period of time.

3. That until such supervising podiatrist or podiatrists be approved by the Panel, Dr. Horwitz' license to practice podiatry should be, and it hereby is, suspended, and his period of probation shall not begin until such supervising podiatrist or podiatrists are approved by the Panel.

4. That Dr. Horwitz shall submit to the panel the names of one to four podiatrists licensed in Colorado who are willing and able to supervise his podiatric practice.

5. That if Dr. Horwitz fails to submit any such names to the panel within 60 days from the date of this order or if the Board does not approve such supervising podiatrist or podiatrists, Dr. Horwitz' license to practice podiatry shall be suspended indefinitely.

6. That the panel shall by further order after the approval of the supervising podiatrist or podiatrists determine the methods and frequency of such supervision,

the periodicity and content of reports, and other administrative matters.

Dated this 1st day of May, 1984.

COLORADO STATE BOARD OF
MEDICAL EXAMINERS
(PANEL B)

By: /s/ John S. Carroll
Member

/s/ Fred R. Paquette
Member

/s/ Christine Peterson
Member

/s/ S. Kozloff
Member

Received at 3:45

COLORADO COURT OF APPEALS

No. 84CA0541

LENORD HORWITZ, D.P.M.,	)	
	)	SUPPLEMENTAL
Petitioner,	)	ORDER OF
	)	HEARING
v.	)	PANEL B
	)	
COLORADO STATE BOARD	)	THE STATE
OF MEDICAL EXAMINERS	)	BOARD OF
and THE PEOPLE OF THE	)	MEDICAL
STATE OF COLORADO, ex rel.	)	EXAMINERS
DUANE WOODARD, Attorney	)	
General,	)	STATE OF
	)	COLORADO
Respondents.	)	

THE STATE BOARD OF MEDICAL EXAMINERS
STATE OF COLORADO

Proceeding No. RG ME DAAED

SUPPLEMENTAL ORDER OF HEARING
PANEL B

PEOPLE OF THE STATE OF COLORADO *ex rel.*
DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.

Respondent.

Hearing Panel B hereby orders the following terms and conditions under which respondent could resume the pactice of podiatry while serving a term of observed probation:

1. Hearings Panel B reaffirms the earlier findings of subject matter and personal jurisdiction over respondent.

2. Hearings Panel B reaffirms the earlier findings of statutory violations, in specific two or more acts or omissions that violate the standard of care in the podiatric community.

3. Hearings Panel B finds that due to the substandard acts, or omissions found in the prior order of this panel, as well as in this order, respondent Horwitz should resume the practice of podiatry only in a observed environment and on probation for at least one year. The fol-

lowing terms and conditions shall apply to the observed probationary term imposed on respondent.

a. The podiatric practice of respondent shall be observed by podiatrists named on attached exhibit A.

b. The observers named shall be responsible for observing and reporting to this Hearings Panel regarding the following aspects of the podiatric practices of respondent: the taking and recording of patient histories; patient physical examinations; diagnosis and treatment of patients; taking and reading of radiographs; laboratory testing, including the obtaining the test specimens and the conduct of tests done intraoffice; operative technique; aseptic technique; use of medications on a post-operative basis; post-surgical follow-up care. The foregoing list is not and should not be considered to be all-inclusive. Instead it is intended to offer some guidance to the observers and to respondent respecting those aspects of the practice of respondent that may require particular scrutiny. The observers are hereby authorized to include in their observations and reports any additional data regarding the respondents practice that is deemed pertinent by the observers.

c. The observers appointed by this panel are required to visit the office(s) of respondent at least twice weekly for the first six months and once per week during the subsequent six months of the probationary period for the purpose of making their observations and reports. These visits shall include at least one visit per week scheduled to observe surgeries conducted by respondent. An observer may make unscheduled and unannounced visits. Respondent shall make all his podiatric records

and all his activities involving the practice of podiatry available to the observers at any time requested by the observers. The observers shall spend a minimum of one hour observing during a visit with respondent.

d. The observers appointed by this panel shall have no obligation whatsoever to instruct, correct, inform, educate or direct respondent with respect to his practice of podiatry. The responsibility of the observers shall be to provide written reports with respect to observations made by the observers of the podiatric practice of respondent. Such written reports which indicate no substandard acts or omissions shall be submitted on a bi-monthly basis to Hearings Panel B, Colorado State Board of Medical Examiners, 1525 Sherman Street, Denver, Colorado 80203. Any written report of the observers that is considered by the observers to indicate any substandard behavior or activity, shall be delivered by hand to the above address within forty-eight hours following such observation.

e. In any instance where the observers undertake to instruct, correct, inform, educate or direct respondent, with respect to the practice of podiatry, respondent shall undertake to conform his actions to the suggestions of the observers.

f. The podiatrists named on exhibit A, agree to act as observers on behalf of this panel and as such are agents of the Board of Medical Examiners. By such participation, they are entitled to the immunity protection of 12-36-118(3), C.R.S. (1983 Supp.).

g. Respondent shall be responsible for reimbursing the observers for their costs and time spent observing and writing reports to the panel. The observers shall

charge no more than $125 per hour for their time. Respondent shall reimburse observers on a weekly basis.

h. At all times while on probation, respondent shall be covered by podiatric liability insurance in the amount of $100,000.

Proof that such coverage exists and access to the responsible agent for the insurance carrier shall be made available by respondent to his observers on demand.

i. During the term of probation, respondent shall make available copies of any records requested by his observers.

4. Regardless of the surgical technique or process usually employed by respondent, during the term of this probation respondent is required by this order to use standard aseptic technique for all podiatric procedures undertaken by respondent or anyone else at his direction.

5. During the term of this probation, respondent shall advance his podiatric training by successfully completing courses in the following areas at his expense: surgery; anesthetics; aseptic technique. Any such course taken by respondent to satisfy this requirement must be approved in writing, in advance, by this panel. Any courses proposed by respondent to fulfill these requirements must be proposed at least two months before the commencement date for the course.

6. If, during the first year of this probation, no negative report from observers is received and the supplemental education required by this order is concluded to the satisfaction of this panel, the probation of respondent will be terminated by the panel. The panel may, however, extend

the probation term as necessary for the protection of the public.

7. If, during the term of this probation, the panel receives any report regarding respondent that is deemed negative to the respondent by the panel, including without being limited to any report indicating the occurrence of an act or omission that constitutes substandard podiatric care for this community or any report indicating a failure by respondent to conform his actions to the requirements of this order, the panel may order that respondent appear before it and show cause why his probation should not be terminated and his podiatry license placed on suspension or revoked. At any such show cause proceeding the Colorado Medical Practice Act, 12-36-101, C.R.S. (1978, 1983 Supp.), the Colorado Podiatric Practices Act, 12-32-101, C.R.S. (1978, 1983 Supp.), and the Colorado Administra- Procedures Act, 24-4-101, C.R.S. (1973, 1983 Supp.) will guide the panel in its deliberations. Respondent may appear, with counsel if desired, and may put forth such evidence and argument as he or his counsel deem appropriate. The Office of the Colorado Attorney General may also appear and put forth such evidence and argument as is deemed appropriate. At the conclusion of any such show cause proceeding, the panel may issue a written order indicating the disposition being made of the matter. Such an order, if issued, shall be appealable to the Colorado Court of Appeals, just as any other final order of the Medical Board. *See:* 12-36-119(2), C.R.S. (1983 Supp.).

8. The provisions of paragraph seven, above, shall not replace or repeal the standard discipline proceedings set out in 12-36-117 and 118, C.R.S. (1978, 1983 Supp.) or in 12-32-107, C.R.S. (1978, 1983 Supp.). Rather, a show

cause proceeding ordered by the Hearings Panel shall be parallel to any other discipline, investigation or proceeding commenced with respect to respondent.

Dated this 10th day of May, 1984.

COLORADO STATE BOARD OF
MEDICAL EXAMINERS—
PANEL B

By /s/ John S. Carroll
Acting Chairman
AG Alpha No. RG ME DAAED
AG File No. DLS8401640/2SC

EXHIBIT A

Submitted as a part of Supplemental Order of Panel B., State Board of Medical Examiners:

PEOPLE
OF THE STATE OF COLORADO *ex rel.*
DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

The following named podiatrists have indicated a willingness to act as observers under the terms and conditions of the Supplemental Order in the above cited matter and are hereby designated as such.

Edward Ballow, D.P.M.
Jay Dworkin, D.P.M.
David Holz, D.P.M.
Ronald Green, D.P.M.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within SUPPLEMENTAL ORDER OF HEARING PANEL B upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 10th day of May 1984, addressed as follows:

Lenord Horwitz, D.P.M.
5110 W. 38th Avenue
Denver, CO 80212

Jordan Hochstadt, Esq.
2043 York Street
Denver, CO 80205

Tom Lyons, Esq. (Interoffice Mail)
1525 Sherman Street, 2d Floor
Denver, CO 80203

/s/ (Illegible)

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS STATE OF COLORADO

Proceeding No. RG ME DAAED

AMENDMENT TO SUPPLEMENTAL ORDER—HEARING PANEL B

APPOINTMENT OF SUBSTITUTE OBSERVERS

PEOPLE OF THE STATE OF COLORADO *ex rel.* DUANE WOODARD, ATTORNEY GENERAL,

Complainant,

vs.

LENORD S. HORWITZ, D.P.M.,

Respondent.

Hearing Panel B hereby amends its Supplemental Order of May 10, 1984, for the purpose of appointing substitute observers due to the failure of acceptance of three of the four observers originally designated.

The Panel hereby deletes subparagraph a. of paragraph 3 of the Supplemental Order and substitutes the following therefor:

> a. The podiatric practice of the respondent shall be observed by the following named individuals who have indicated their agreement to observe:
>
> Dr. Jay Dworkin—D.P.M.— Exhibit A
> Dr. Lawrence Varner—D.O.— Exhibit B
> Dr. Terry Wintory—D.O.— Exhibit C
> Dr. William Winter—M.D.— Exhibit D
>
> In the event less than all are able or willing to serve or continue serving as observers, the remaining individuals may agree to continue as such.

It is the professional opinion of the Panel that all four of the above appointees are well qualified to observe and apply the required standard of care to the respondent's practice of podiatry. Although the majority of the observers are not podiatrists, the three latter named doctors are qualified orthopedic surgeons with specific expertise and familiarity regarding the practice of podiatry. The observational standard shall be as stated in paragraph 7 of the Supplemental Order and shall be the standard of podiatric care in this community.

The Panel directs the representative of the Attorney General's Office who has acted as attorney for the com-

plainant to properly notify the Court of Appeals of the above action.

DATED this 20th day of July, 1984.

COLORADO STATE BOARD OF
MEDICAL EXAMINERS
(PANEL B)

/s/ Christine Peterson
MEMBER

/s/ Stephen R. Kozloff
MEMBER

/s/ Fred R. Paquette
MEMBER

.....
MEMBER

EXHIBIT A

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS, STATE OF COLORADO

Proceeding No. RG ME DAAED

AGREEMENT TO SERVE AS A HEARINGS PANEL OBSERVER

PEOPLE OF THE STATE OF COLORADO, *ex rel.* DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

I, Jay Harvey Dworkin, DPM state that I do agree to serve Hearings Panel B of the Colorado State Board of Medical Examiners in the capacity of an observer of the podiatric practice of Lenord S. Horwitz, D.P.M. I further state that I read and am aware of the Findings of Fact, Conclusions of Law and Order of that Hearings Panel, issued May 1, 1984, as well as the Supplemental Order of that Panel, issued May 10, 1984. The role of observer described in those orders is understood by me and I will endeavor to fulfill that role to the best of my ability in accordance with the terms set out therein.

/s/ Jay Harvey Dworkin
Signature

EXHIBIT B

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS, STATE OF COLORADO

Proceeding No. RG ME DAAED

AGREEMENT TO SERVE AS A HEARINGS PANEL OBSERVER

PEOPLE OF THE STATE OF COLORADO, *ex rel.* DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

I, Lawrence Norman Varner, D.O., state that I do agree to serve Hearings Panel B of the Colorado State

Board of Medical Examiners in the capacity of an observer of the podiatric practice of Lenord S. Horwitz, D.P.M. I further state that I read and am aware of the Findings of Fact, Conclusions of Law and Order of that Hearings Panel, issued May 1, 1984, as well as the Supplemental Order of that Panel, issued May 10, 1984. The role of observer described in those orders is understood by me and I will endeavor to fulfill that role to the best of my ability in accordance with the terms set out therein.

/s/ Lawrence N. Varner, DO
Signature

EXHIBIT C

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS, STATE OF COLORADO

Proceeding No. RG ME DAAED

AGREEMENT TO SERVE AS A HEARINGS PANEL OBSERVER

PEOPLE OF THE STATE OF COLORADO, *ex rel.* DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

I, Terry Joel Wintory, D.O., state that I do agree to serve Hearings Panel B of the Colorado State Board of Medical Examiners in the capacity of an observer of the

podiatric practice of Lenord S. Horwitz, D.P.M. I further state that I read and am aware of the Findings of Fact, Conclusions of Law and Order of that Hearings Panel, issued May 1, 1984, as well as the Supplemental Order of that Panel, issued May 10, 1984. The role of observer described in those orders is understood by me and I will endeavor to fulfill that role to the best of my ability in accordance with the terms set out therein.

/s/ Terry Joel Wintory, D.O.
Signature

EXHIBIT D

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS, STATE OF COLORADO

Proceeding No. RG ME DAAED

AGREEMENT TO SERVE AS A HEARINGS PANEL OBSERVER

PEOPLE OF THE STATE OF COLORADO, *ex rel.* DUANE WOODARD, Attorney General,

Complainant,

v.

LENORD S. HORWITZ, D.P.M.,

Respondent.

I, Wm. Gordon Winter, Jr., MD, state that I do agree to serve Hearings Panel B of the Colorado State Board of Medical Examiners in the capacity of an observer of the podiatric practice of Lenord S. Horwitz, D.P.M. I

further state that I read and am aware of the Findings of Fact, Conclusions of Law and Order of that Hearings Panel, issued May 1, 1984, as well as the Supplemental Order of that Panel, issued May 10, 1984. The role of observer described in those orders is understood by me and I will endeavor to fulfill that role to the best of my ability in accordance with the terms set out therein, with modifications as decreed by the court on 7/13/84 and verbally discussed with Mr. J. Riley.

/s/ Wm. Gordon Winter, Jr.
Signature

CERTIFICATE OF SERVICE

I, Thomas J. Beckett, Program Administrator to the Colorado Board of Medical Examiners, on July 24, 1984, placed in the U.S. Mail, postage prepaid, the attached Amendment to the Supplemental Order of Hearing Panel B, Appointment of Substitute Observers, issued July 20, 1984, in proceeding no. RG ME DAAED, addressed as follows:

Lenord Horwitz, D.P.M. (certified mail return receipt requested)
5110 W. 38th Avenue
Denver, CO 80212

Jordan Hochstadt, Esq.
2043 York St.
Denver, CO 80205

/s/ Thomas J. Beckett

APPENDIX K

ARTICLE XII

Officers

Section 8. *Oath of civil officers.* Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter.

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-550

In The
Supreme Court of the United States
October Term, 1987

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; ROBERT L. LEDERER, M.D.; JACK KLAPPER, M.D.; RAY PIPER, D.O.; FRED PACQUETTE, M.D.; CHRISTINE PETERSON, M.D.; JOHN CARROLL; STEPHEN KOZLOFF, M.D.; BRUCE WILSON; and MICHAEL VITEK, M.D.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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John Carroll
Stephen Kozloff, M.D.
Bruce Wilson
Michael Vitek, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred in affirming the granting of Summary Judgment by the District Court in favor of the respondents on the ground that the members of the Colorado State Board of Medical Examiners are absolutely immune from liability for suits brought under 42 U.S.C. § 1983?

2. Whether the Tenth Circuit Court of Appeals erred in affirming the granting of Summary Judgment by the District Court in favor of the respondents on the ground that the members of the Colorado State Board of Medical Examiners are qualifiedly immune from liability as a matter of law, if not absolutely immune from liability, for suits brought under 42 U.S.C. § 1983?

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No. 87-550

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Respondents.

RESPONSE TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado and the opinion of the Tenth Circuit Court of Appeals in this case, have been reproduced and are attached to the Petition for Certiorari.

STATEMENT OF FACTS

From 1979 to 1983, 16 charges of unprofessional conduct were filed against Dr. Lenord D. Horwitz, D.P.M., with the State Board of Medical Examiners for the State

of Colorado. The Board is the State body empowered to license physicians and to take disciplinary action against them. Fifteen of these 16 charges were initiated by the Board. Prior to July 15, 1983, after two evidentiary hearings involving 14 of the charges, the Hearing Panel of the Board found that Dr. Horwitz had not violated any provision of the Podiatry Act, C.R.S. § 12-32-107, as amended. On July 15, 1983, Dr. Horwitz and the Board entered into a stipulation whereby the Board agreed to dismiss with prejudice the two remaining charges of unprofessional conduct against Dr. Horwitz in consideration of Dr. Horwitz agreeing to allow his surgical practice to be supervised by an ambulatory foot surgeon and his record keeping practice to be supervised by a podiatrist. Dr. Stephen Albert was appointed by the Board to serve as supervisor for both record keeping and surgery.

Dr. Albert submitted reports to the Board prior to December 1, 1983, indicating that certain records kept by Dr. Horwitz had been deficient, but that Dr. Horwitz had undertaken corrective measures. Prior to December 1, 1983, Dr. Albert had not submitted any negative reports relative to Dr. Horwitz' surgical practice.

On December 1, 1983, Dr. Albert and Dr. Horwitz met with the Inquiry Panel of the Board regarding why Dr. Albert had supervised only a limited number of Dr. Horwitz' surgical procedures. During the course of this meeting, but out of the presence of Dr. Horwitz, Dr. Albert expressed concern about the quality of Dr. Horwitz' surgical practice and stated his belief that Dr. Horwitz was a danger to the public. The Inquiry Panel thereafter met with Dr. Horwitz and his attorney regarding why the

number of surgical supervisions set forth in the stipulation had not occurred. No reference was made to Dr. Albert's complaints about Dr. Horwitz' surgical practice. Following Dr. Horwitz' departure from this meeting, the Inquiry Panel voted to summarily suspend Dr. Horwitz' license to practice podiatry in Colorado and instructed the Office of the Attorney General to prepare a formal complaint.

The Board's formal Order of Summary Suspension, dated December 21, 1983, was based both on oral and written reports submitted by Dr. Albert to the Board and contained the finding required under C.R.S. § 24-4-104(4) that the Board had reasonable grounds to believe that Dr. Horwitz' practice of podiatry constituted a threat to his present and future patients, and therefore to the public health, safety and welfare such as to imperatively require emergency action. See Appendix H to the Petition for Certiorari.

On January 4, 1984, Dr. Horwitz was served with the Order of Summary Suspension and formal complaint. Dr. Horwitz submitted his written response on January 5, 1984, the next day, but continued to practice podiatry until restrained from doing so by order of the District Court for the City and County of Denver on January 9, 1984. Within fifteen (15) days of Dr. Horwitz' written response to the Order and formal complaint and within ten (10) days of the issuance of the temporary restraining order, a full evidentiary hearing, beginning January 19, 1984, was held before a qualified hearing officer. Dr. Horwitz was represented by counsel and was afforded opportunity to present evidence, express his position and to fully cross-examine all witnesses.

On February 6, 1984, the Hearing Officer rendered his decision. See Appendix J to the Petition for Certiorari. He found in Dr. Horwitz' favor on 42 of the 44 allegations and found against him on two charges, which the Hearing Officer identified as relatively minor. The Hearing Officer recommended that Dr. Horwitz' license to practice podiatry be immediately reinstated, subject to his completion of the supervision previously agreed upon. Thereafter, both the Hearing Panel and the Inquiry Panel of the Board denied Dr. Horwitz' applications for reinstatement. On May 1, 1984, the Hearing Panel, following a review of the Hearing Transcript, entered its final order which in part affirmed the Hearing Officer's decision, in part modified the decision and in part included independent findings. See Appendix J to the Petition for Certiorari. The order placed Dr. Horwitz on one year probation and he remained subject to supervision. There were also certain additional requirements imposed.

On May 2, 1984, the day following the Board's Final Order, Dr. Horwitz filed an appeal with the Colorado Court of Appeals seeking State Court review of the agency action taken by the Board with respect to the summary suspension of his license. Before the Court of Appeals, Dr. Horwitz alleged the same facts as he has in this action and sought relief from the Board's orders on the theories of lack of jurisdiction, procedural defect, violation of the plaintiff's Fourteenth Amendment due process rights and violation of his statutory rights to due process.

On June 27, 1985, the Colorado Court of Appeals filed its opinion in the plaintiff's State case. See attached Appendix A. The Court addressed, and decided adversely to Dr. Horwitz, all of the plaintiff's jurisdictional, pro-

cedural, Constitutional and statutory due process arguments. A Petition for Certiorari to the Colorado Supreme Court was then filed by Dr. Horwitz. This Petition was denied. See attached Appendix B. Dr. Horwitz filed an appeal with the United States Supreme Court. This Court denied that appeal, and then, treating the appeal as a petition for Certiorari, denied that petition. See attached Appendix C.

Dr. Horwitz filed this action pursuant to 42 U.S.C. § 1983 and 1988 against the State Board of Medical Examiners as an entity and against its then current members. See Appendix G to the Petition for Certiorari. He sought compensatory and punitive damages, together with attorneys fees. Dr. Horwitz alleged that he had been subjected to unfounded complaints, was summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights, was defamed and subjected to outrageous conduct. The Board, as an entity, was dismissed from the suit by virtue of the State's claim of sovereign immunity under the Eleventh Amendment to the United States Constitution. That ruling has never been challenged.

The District Court granted Summary Judgment in favor of the individual members of the Colorado State Board of Medical Examiners, holding that they were absolutely immune from liability from 42 U.S.C. § 1983 damages suits under *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978). See Appendix A to Petition for Certiorari. In addition, the Court held that if the members of the Board were not entitled to absolute immunity, then they were at least entitled to qualified immu-

nity. The Court upheld the granting of summary judgment on this ground as well.

Dr. Horwitz then appealed to the Tenth Circuit Court of Appeals on the two immunity issues. The Tenth Circuit affirmed the District Court in all respects, also finding that the members of the Colorado State Board of Medical Examiners were absolutely immune from liability for suits pursuant to 42 U.S.C. § 1983 and, if they were not absolutely immune, they were also entitled to qualified immunity. See Appendix B to Petition for Certiorari. Dr. Horwitz then filed his petition for Writ of Certiorari with the United States Supreme Court.

———o———

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

A. THE TENTH CIRCUIT COURT OF APPEALS AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO CORRECTLY APPLIED THE LAW OF THIS COURT IN REACHING THEIR CONCLUSION, FINDING THE BOARD MEMBERS ABSOLUTELY AND QUALIFIEDLY IMMUNE FROM SUIT.

The Colorado State Board of Medical Examiners is a statutory body whose 11 members are appointed by the Governor. C.R.S. § 12-36-103(1). Its powers, duties and functions are set forth in the Colorado Medical Practices Act, C.R.S. § 12-36-101 *et seq.* (1973 as amended) and the Colorado Administrative Procedure Act, C.R.S. § 24-4-101, *et seq.* (1973 as amended).

Broad judicial and prosecutorial powers of the Board are set forth in C.R.S. § 12-36-104. Board procedures re-

quired for disciplinary proceedings are set forth in C.R.S. § 12-36-118. The Board consists of a president and ten members, two of whom are from the public at large and nine of whom are licensed physicians. The president of the Board divides the members into two panels for disciplinary action, with each panel consisting of at least four (4) physician members. Each panel serves as both an Inquiry Panel and a Hearing Panel. When a written complaint is received, the Inquiry Panel undertakes investigation into the charges in order to determine whether there are sufficient grounds for a hearing. All matters referred to one panel for investigation shall be heard, if referred for formal hearing by the other panel. The Board, in its discretion, may elect to refer a case for formal hearing to a qualified hearing officer for his initial decision. The initial decision, is subject to review by the Hearings Panel of the Board. The Board is empowered to investigate all complaints as well as initiate them. The statutory scheme provides for notice to the individual against whom a complaint is filed and an opportunity for such individual to respond. At all formal hearings, whether before the Hearings Panel or a qualified hearing officer, the complained against party may be present, with counsel, offer evidence and be heard in his own defense. Witnesses in the proceeding are sworn and a complete record, with testimony, is made. Ultimately, the Hearings Panel will determine whether the charges have been proven and, if such charges are proven, the panel determines what it deems to be appropriate relief. When the Hearings Panel submits its report or order with its findings and conclusion, it becomes the order of the Board.

C.R.S. 24-4-104(4) empowers the Board to summarily suspend an individuals license to practice medicine when

the Board has reasonable grounds to believe that the public health, safety or welfare is endangered and the Board finds that emergency action is required. In *Colorado State Board of Medical Examiners v. The District Court*, 191 Colo. 158, 551 P.2d 194 (1976), the Colorado Supreme Court upheld the statute against due process contentions similar to those advanced in this case. The Colorado Court of Appeals on review of the order of the Board entered in this case specifically upheld the Board's action in summarily suspending Dr. Horwitz' license to practice medicine under *Colorado State Board, supra.* Further, that Court found that the record did support the Board's determination that there were reasonable grounds to believe that emergency action was required.

1. The Members of the Colorado State Board of Medical Examiners Are Absolutely Immune from Suit.

This Court has followed a functional approach to immunity law. Absolute immunity flows not from rank or title or location within government, but rather from the nature of the responsibilities of the individual official. *Cleavinger v. Saxner*, 474 U.S. —, 88 L.Ed.2d 507, 514, 106 S.Ct. — (1985).

In *Butz v. Economou, supra,* the Court discussed this concept at length. In so doing, the Court found that agency officials who perform functions analogous to those of a court or prosecutor are entitled to the absolute immunity which traditionally has cloaked judges and prosecutors. In addition, the Court extended immunity to those agency officials who decide to initiate a prosecution, which was separate and distinct from the immunity afforded the

prosecutor who actually prosecuted a case for the agency. The rationale for this immunity was based upon the need for these officials to conduct their hearings and business free from the intimidating threat of reprisals from individuals against whom they might take action. The Court found that the safeguards inherent in administrative proceedings sufficiently protected the constitutional rights of parties thereby reducing the need for private damages actions. The Court made clear that its immunity rationale applied to claims against state officials under 42 U.S.C. § 1983, such as those present in this case.

The Inquiry Panel consistent with its statutory duties, is entitled to immunity for initiating proceedings against Dr. Horwitz. The Inquiry Panel heard the oral report of Dr. Albert and received his written report reflecting his concerns about the practice of Dr. Horwitz. By making the required statutory findings for invoking the summary suspension statute, the Inquiry Panel decided to initiate proceedings against Dr. Horwitz and instructed the Colorado State Attorney General's Office to do so on its behalf. Under *Butz v. Economou, supra,* they are entitled to absolute immunity for their decision to initiate this prosecution.

Similarly, the lower courts have correctly found that the Hearing Panel, and Inquiry Panel, were both entitled to judicial immunity. The Board reviewed the entire record produced in the evidentiary hearing and affirmed and modified the examiner's non-binding decision as well as making additional findings on their own. The Board then issued its final order disciplining Dr. Horwitz. These functions are completely compatible with and analogous

to the functions of a court entitling them to absolute immunity under *Butz v. Economou, supra.*

The immunity afforded the Board members is entirely necessary, as found by the lower courts, to allow the Board to carry out its statutory duties. This case represents a situation in which a person against whom agency action is initiated and prosecuted reacts by filing a threatening law suit. This is precisely the reason relied upon by the Court in *Butz, supra,* to support its granting of immunity to agency officials. Less than complete immunity for these individuals would deter qualified and competent professionals from serving on the Board, in any capacity, thereby increasing the dangers of individuals practicing medicine while constituting a threat to the health of their patients.

The lower courts in this case have correctly applied the law of absolute immunity in agency proceedings as that law is set forth in *Butz v. Economou, supra,* and their decision that the Board members are entitled to absolute immunity is entirely correct.

2. Members of the Colorado State Board of Medical Examiners Are Qualifiedly Immune from Suit.

Even assuming that the Board members are entitled only to the qualified immunity set forth in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the lower courts have both held that the Board members are entitled to such qualified immunity as a matter of law. The Board members have violated no clearly established constitutional or statutory rights of Dr. Horwitz. The Board is entitled to summarily suspend Dr.

Horwitz's license as long as he was provided a prompt post-deprivation hearing. *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

As both lower courts have found, Dr. Horwitz was provided with a prompt hearing after the summary suspension order issued, within fifteen (15) days of the Notice of Suspension to him and within ten (10) days of the date he stopped practicing podiatry. In fact, Dr. Horwitz filed his response on January 5, 1984, the day after he was notified of the suspension. As such Dr. Horwitz has not been unconstitutionally deprived of any right by the holding of a post-suspension hearing.

Nor can Dr. Horwitz complain of the hearing procedures themselves as being inadequate thereby depriving him of due process. He was given every opportunity to present his side of his story, first with his response filed on January 5, 1984 and second through the hearing which began on January 19, 1984. The hearing itself provided all of the features of an adversarial hearing before an impartial trier of fact. Dr. Horwitz was fully represented by counsel at the hearing and he had every opportunity to cross-examine witnesses. The entire record was reviewed by the Board prior to a final order issuing in May of 1984. This order issued within three months of the hearing officer's initial decision. Dr. Horwitz, as correctly found by the lower courts, has not been deprived of any constitutional due process rights.

Dr. Horwitz argues that there have been statutory violations by the Board as well. Dr. Horwitz simply argues that the Board should have acted under other statutory provisions that would have afforded him notice and

an opportunity to respond before his license was suspended. He chooses to ignore the fact that the Board acted pursuant to the emergency statute after the requisite finding was made that the Board had reasonable grounds to believe that Dr. Horwitz's practice of podiatry constituted a threat to his present and future patients, and therefore to the public health, safety and welfare such as to imperatively require emergency action. This statute, as indicated above, has previously been upheld as constitutional against similar due process attacks. As found by the lower courts, there has been no statutory violation by the Board. Therefore, the Board members are entitled to qualified immunity in that they have violated no clearly established constitutional or statutory rights of Dr. Horwitz.

Although Dr. Horwitz has continued to argue, albeit without authority, that the Board members are entitled only the qualified immunity set out in the statutory scheme, the lower courts have correctly rejected this contention. The Board members have claimed that they are entitled to common law immunity, outside of any conferred by statute, and the lower courts have correctly found this to be the case.

Dr. Horwitz has also argued that the Board members have failed to take oaths, citing Article XII, Section 8 of the Colorado Constitution. See Appendix K of the Petition for Certiorari. In *Hedstrom v. Motor Vehicle Division*, 662 P.2d 173 (Colo. 1983), the Colorado Supreme Court found that the oaths required by Article XII, § 8 applied only to those executive officers named in Article IV, § 1 of the Colorado Constitution, the Governor, Lieu-

tenant Governor, Secretary of State, State Treasurer and State Attorney General. Dr. Horwitz' argument that this section of the Colorado Constitution required oaths for the Board members, is specious and contrary to established state law in Colorado.

Moreover, there is substantial Colorado authority for the proposition that at all times the Board members were defacto officials duly authorized to carry out their responsibilities under law. *Butler v. Phillips,* 38 Colo. 378, 381, 88 P. 480 (1906). See *Andrade v. Lauer,* 729 F.2d 1475 (D.C. Cir. 1984).

CONCLUSION

At all times, the Board members were functionally comparable to a court of law. They decided to initiate the prosecution of Dr. Horwitz and then reviewed the case in its entirety before making a final decision. Moreover, Dr. Horwitz was provided with a prompt post-deprivation hearing which did not violate any of his clearly established constitutional or statutory rights. The lower courts' decisions finding the Board's members absolutely and qualifiedly immune from suit should be upheld in their entirety.

Respectfully submitted,

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EXHIBIT A

COLORADO COURT OF APPEALS

No. 84CA0541

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

COLORADO STATE BOARD OF MEDICAL EXAMINERS and THE PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General,

Respondents.

Review of Order from the Board of Medical Examiners of the State of Colorado

DIVISION I	ORDER AFFIRMED IN
Opinion BY CHIEF	PART, SET ASIDE IN
JUDGE ENOCH	PART, AND CAUSE
Pierce and Babcock, JJ.,	REMANDED WITH
concur	DIRECTION

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(SEAL)

APPENDIX

IV

Petitioner, Lenord S. Horwitz, a podiatrist, appeals from an order of the State Board of Medical Examiners (Board) which placed his practice on one-year probation, subject to supervision and other requirements. We set aside in part and remand.

The Board is divided into two panels when conducting disciplinary proceedings. Section 12-36-118(1), C.R.S. (1984 Cum. Supp.). One panel is designated an "inquiry panel," the other a "hearings panel." Upon receipt of a written complaint, the inquiry panel investigates and determines whether there are sufficient grounds for a hearing. Section 12-36-118(4), C.R.S. (1984 Cum. Supp.). The hearings panel may then conduct an evidentiary hearing, or may appoint a hearing officer to conduct the hearing subject to its review. Section 12-36-118(1) and (5), C.R.S. (1984 Cum. Supp.). The hearing panel's report of its findings and conclusions, when approved and signed by a majority of the members of the panel who have conducted the hearing, becomes the action of the Board. Section 12-36-118(5)(g)(I), C.R.S. (1984 Cum. Supp.). When appropriate, the hearing panel is mandated to determine the extent of discipline within the statutory guidelines. Section 12-36-118(5)(g)(III), C.R.S. (1984 Cum. Supp.).

On July 15, 1983, petitioner and the Board entered into a stipulation which provided that two charges of unprofessional conduct which had been brought would be dismissed with prejudice in return for petitioner's agreement to complete 40 hours of continuing podiatric education in the area of surgery, to have his surgical practice super-

vised by an ambulatory foot surgeon, and to have his record-keeping supervised by a podiatrist. Dr. Albert, a podiatrist, was appointed to serve in both capacities.

On December 1, 1983, at a meeting with the inquiry panel to discuss scheduling difficulties, Dr. Albert was asked his opinion of petitioner's standard of care. He stated that in his opinion, because of poor technique and gross negligence, petitioner was a danger to the health, safety, and welfare of the public. After receiving these new charges, detailed in writing, the inquiry panel instructed the Attorney General to file a new complaint against petitioner, and on December 21, 1983, an order summarily suspending his license was entered.

A hearing was held before a hearing officer, and on February 6, 1984, the officer found two deviations from the standard of care: that X-rays were not available until surgery had virtually been started, and that a culture plate was left exposed to the air for one to three hours prior to incubation. Nevertheless, he recommended that petitioner's license be immediately reinstated, that no further discipline be imposed as a result of the charges, and that petitioner's supervision under the stipulation continue. Despite that recommendation, both the inquiry panel and the hearing panel denied petitioner's request to vacate the summary suspension.

Exceptions were filed to these findings, and after a hearing before the hearing panel it entered its final order on May 1, 1984. The panel affirmed the hearing officer's factual findings but found that the weight of the evidence supported an additional finding that the procedure used to sterilize swabs did not render them sterile, and,

thus, failed to meet generally accepted standards of care. It was ordered that he should be granted probation on the condition that supervision of his practice by podiatrists be continued, and that he commit no acts or omissions that constitute substandard medical care during the probationary period. Further, the suspension of his license was to be lifted as soon as he found Board approved supervisors.

On May 3, 1984, this court ordered the Board to locate and approve, by May 11, 1984, a podiatrist or podiatrists to supervise the petitioner's practice and to specify the terms and conditions of the probation. On May 10, the Board issued a supplemental order which appointed four podiatrists as observers, and stated probationary conditions that included the completion of courses in surgery, anesthetics, and aesptic technique. After this order was issued, petitioner demonstrated to this court that these podiatrists were unwilling to serve. On July 20, 1984, the Board amended its supplemental order to include the names of four new observers, only one of which was a podiatrist. Following this Board action, we granted petitioner's motion for stay pending this appeal.

I.

Petitioner first contends that the Board lacked jurisdiction to enter its orders because they were procedurally defective and violated his right to due process of law. He argues that the Board failed to follow the notice and hearing requirements of § 24-4-101 and §§ 12-32-101, et seq. C.R.S. (Colorado Podiatry Act), and §§ 12-36-101, et seq., C.R.S. (Colorado Medical Practices Act). We do not agree.

Colorado State Board of Medical Examiners v. District Court, 191 Colo. 158, 551 P.2d 194 (1976) specifically held that § 24-4-104(4), C.R.S., authorizes the Board to suspend summarily a license to practice medicine when it has reasonable grounds to believe that the public health, safety, or welfare is endangered, that emergency action is required, and the Board has incorporated such findings into its order. Furthermore, *Colorado State Board* rejected a due process argument similar to the one made by petitioner here.

The record supports the Board's determination that it had reasonable grounds to believe that emergency action was required. Although eventually most of the allegations were not proven, the Board was initially faced with the fact that 44 complaints had been lodged against petitioner by the Board-appointed supervisor. The Board's action was thus reasonably taken pursuant to its statutory authority under § 24-4-104(4), C.R.S., and that action is entitled to a presumption of validity and constitutionality which has not been overcome. *See Mitchell v. Charnes*, 656 P.2d 719 (Colo. App. 1982).

Petitioner has cited to the court the recent case of *Cleveland Board of Education v. Loudermill*, 470 U.S. —, 106 S.Ct. —, 84 L.Ed. 494 (1985), as support for his contention that § 24-4-104(4), C.R.S., violates his due process rights. Contrary to his contention, the Supreme Court in *Loudermill*, and the cases cited therein, continues to recognize that emergency action in certain cases, such as we have here, where the public welfare and safety may be affected, is not a violation of one's due process rights. The decision in *Loudermill*, *supra*, in our view does not affect the holding of *Colorado State Board*, *supra*.

Petitioner argues alternatively that even if the Board had the authority to suspend his license summarily, it failed to follow required procedures in so doing, and erred in not lifting the suspension after the hearing officer's initial findings. We disagree.

In *Colorado State Board, supra,* the Supreme Court rejected a similar argument that in cases of summary suspension statutory notice and hearing is required. In such cases the Board is required to provide the opportunity "for an ultimate judicial determination within a reasonably prompt time." *Colorado State Board, supra. See also Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed. 2d 365 (1979).

Here, petitioner concedes that the Board accorded him virtually an immediate hearing on the merits of the complaints. There is nothing in the record to indicate that the Board delayed its determination in any way, or that its final determinations were not reasonably prompt. *See Loudermill, supra.* Furthermore, because exceptions were filed to the hearing officer's initial findings, and because the findings explicitly stated that supervision of petitioner's practice should continue, and that the supervisor had resigned, it was not unreasonable, nor an abuse of discretion, for the Board to allow the suspension to continue.

II.

Petitioner next contends that the Board's orders are tainted with an unlawful appearance of unfairness by its consultation with the "Conflicts Counsel" from the Attorney General's office, and with an allegedly biased Podiatry Board. We find no merit in these contentions.

The Attorney General's office is required to serve both as the Board's counsel, and to prosecute charges before hearing panels and provide representation in support of Board decisions. To avoid the appearance of impropriety and to maintain the integrity of the administrative process, the regulatory law section and conflicts counsel has been separated within the attorney general's office. *Cf. Osborn v. District Court*, 619 P.2d 41 (Colo. 1980). Additionally a Board's actions are entitled to a legal presumption of regularity and validity, *Mitchell, supra*, which petitioner did nothing to overcome. Furthermore, petitioner concedes that there is no reason to believe that conflicts counsel participated in the deliberations of the Board.

Nor is there evidence that petitioner was prejudiced in any way by the Board's mandatory consultation with the Podiatry Board. *See* § 12-32-104, C.R.S. A fair hearing had already been accorded him prior to any consultation, *see McGee v. State Board of Accountancy*, 169 Colo. 87, 453 P.2d 800 (1969), and, unlike his prior hearing, petitioner presented no evidence to demonstrate that the Podiatry Board was still biased against him. Thus, petitioner failed to overcome the presumption of regularity.

III.

Petitioner also contends that the Board's orders are based on erroneous factual determinations, contrary to the weight of the evidence. We agree in part, but hold that any error is harmless.

The issue here concerns the Board's finding that petitioner did not properly sterilize swabs used in his practice, even though the hearing officer had found that the

evidence did not support the complaint on this matter. This decision by the Board was erroneous because the hearing officer's contrary finding of evidentiary fact was supported by competent evidence. *See* § 24-4-105(15)(b), C.R.S. (1982 Repl. Vol. 10); *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982).

The error is harmless, however, because the hearing officer found, and the Board affirmed, that petitioner had engaged in two deviations from the standard of care. Section 12-32-107(3)(i), C.R.S. (1984 Cum. Supp.) states that unprofessional conduct is defined as "two or more acts or omissions which fail to meet generally accepted standards of the practice of podiatry," and § 12-32-107(2), C.R.S., allows the Board to revoke or suspend the license to practice podiatry of one guilty of unprofessional conduct. Thus, an erroneous determination that the petitioner had participated in three acts which deviated from the standard of care, as opposed to two, does not affect the Board's ability to impose sanctions.

IV.

Petitioner next contends that there is no reasonable relationship between the conditions of probation imposed by the Board in its supplemental order and the unprofessional conduct which it found had been committed. We agree in part.

Section 12-36-118(5)(g)(III), C.R.S. (1984 Cum. Supp.) provides that when the Board finds charges have been proven it may order a podiatrist to continue to practice under probation, and may include in such order the probationary conditions it deems appropriate to assure

that petitioner practices in accordance with generally accepted professional standards. Here, it was established that petitioner had engaged in unprofessional conduct because of two deviations from the standard of care, § 12-32-107(3)(i), C.R.S., and it is thus not unreasonable for the Board to require continued observation. Section 12-36-118(5)(g)(III)(C), C.R.S., provides that one condition of probation may be "the review of supervision of his practice as may be necessary *to determine the quality of his practice* and to correct deficiencies therein." (emphasis added)

Although the Board has ordered the observation of areas of petitioner's practice which were not found substandard, the Board is empowered by its finding of unprofessional conduct to oversee petitioner's practice and determine the extent of such conduct. The Board has discretion in disciplinary matters, and we cannot say as a matter of law that it has abused its discretion here. *Cardamon v. State Board of Optometric Examiners,* 165 Colo. 520, 441 P.2d 25 (1968).

We agree, however, that the Board abused its discretion as a matter of law in requiring petitioner to complete courses in the area of surgery, anesthetics, and aseptic technique because there were no supportable findings from the hearing of substandard conduct in these areas. Section 12-36-118(5)(g)(III)(B), C.R.S. (1984 Cum. Supp.) states that as a probationary condition the Board may require one to take "such . . . course of training or education *as may be needed to correct deficiencies* as may be found . . . *in the hearing.*" (emphasis added) Hence, the language of this subsection requires that any courses in-

stituted as a probationary condition must be for the purpose of correcting a specific deficiency found in the hearing.

Here, the Board did make a finding at the hearing that petitioner's aseptic procedures were substandard because of the evidence concerning the improperly sterilized swabs. However, we have held in part III of this opinion that this finding was in error. Thus, there is no valid finding to support the order of the educational requirements in aseptic techniques and procedures.

It was also an abuse of discretion for the Board to have required petitioner to complete a course in anesthetics and surgery as a probationary condition, because there were no findings of deficiencies as a result of the hearing concerning these procedures. This holding, however, does not affect petitioner's obligation to complete 40 hours of continuing podiatric education in the area of surgery, which was part of the 1983 stipulation. The stipulation specifically states that any future Board findings do not stay its requirements.

V.

Petitioner contends that the Board's appointment in its amended supplemental order of observers who are not podiatrists is improper because the medical doctor and doctors of osteopathic medicine who will be observing and determining the quality of his practice will be unable to do so under the appropriate standard of care. We agree.

As previously stated, the Board is allowed to appoint observers to determine the quality of petitioner's practice to enable it to correct deficiencies therein. However, the

quality of a medical practice is determined according to the standard of care used by those in the same field. *Connelly v. Kortz,* 689 P.2d 728 (Colo. App. 1984). And, in general practitioners of one school of medicine are not competent to testify as to the standards of care of another. *Caro v. Bumpus,* 30 Colo. App. 144, 491 P.2d 606 (1971). Thus, the standard of care is the degree of skill that is customarily observed by practitioners of podiatry, and not the standards of practice or methods of practices of other schools of medicine. *See Caro v. Bumpus, supra.*

We thus hold that the Board abused its discretion when it appointed two osteopathic doctors and a medical doctor to serve as observers for the petitioner's practice.

VI.

Petitioner's contention that the failure of Board members to take an oath of office renders its proceedings null and void is without merit. *See Hedstrom v. Motor Vehicle Division,* 662 P.2d 173 (Colo. 1983).

Nor do we find that the Board's appointment of observers under its supplemental orders was the result of bad faith or was intended to harass or delay, and thus, we disagree with petitioner's contentions in this regard and deny his request for attorneys' fees. *See Mission Denver Co. v. Pierson,* 674 P.2d 363 (Colo. 1984); C.A.R. 38(d).

The Board's order which conditioned the petitioner's probation upon the completion of courses in anesthetics, aseptics, and surgery is set aside. However, as previously stated, this holding does not affect petitioner's obligation to take courses in surgery as specified in the original

stipulation of July 1983. In all other respects the order is affirmed. The cause is remanded to the Board for the limited purpose of appointment of observers who have been trained in the field of podiatry. Copies of the written order of appointment and acceptance by the observers shall be certified and forwarded immediately to this court. The court will then reconsider its stay order, which shall remain in effect until further order of courts. In the event the certified copies have not been filed with the court within 30 days of this opinion, the Board shall, in writing, advise the court of the status of the proceedings.

JUDGE PIERCE and JUDGE BABCOCK concur.

EXHIBIT B

SUPREME COURT, STATE OF COLORADO
Case No. 85SC492
Certiorari to the Colorado Court of Appeals 84CA0541
Appeal, State Board of Medical Examiners
RG ME DAAED

ORDER OF COURT

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

COLORADO STATE BOARD OF MEDICAL EXAMINERS and THE PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is DENIED.

BY THE COURT, EN BANC, MARCH 17, 1986.
CHIEF JUSTICE QUINN does not participate.

cc: Gary Sonke, Clerk
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(SEAL)

EXHIBIT C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 6, 1986

Mr. Thomas J. Lyons
Office of the Attorney General
1525 Sherman St., 2nd Floor
Denver, CO 80203

(Received October 9, 1986)

Re: Lenord S. Horwitz
v. State Board of Medical Examiners
of Colorado, et al.
No. 85-2046

Dear Mr. Lyons:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. Justice Scalia took no part in the consideration or decision of this case.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk